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EDITED FOR THE SOCIETY BY

SIR JOHN MACDONELL, C.B., LL.D.,

AND

EDWARD MANSON, Esq.

"Δεῖ καὶ τὰς ἄλλας ἐπισκέψασθαι πολιτείας . . . ἵνα τό τ' ὀρθῶς ἔχον ὀφθῃ καὶ τὸ χρήσιμον."—Arist. *Pol.* II. 1.

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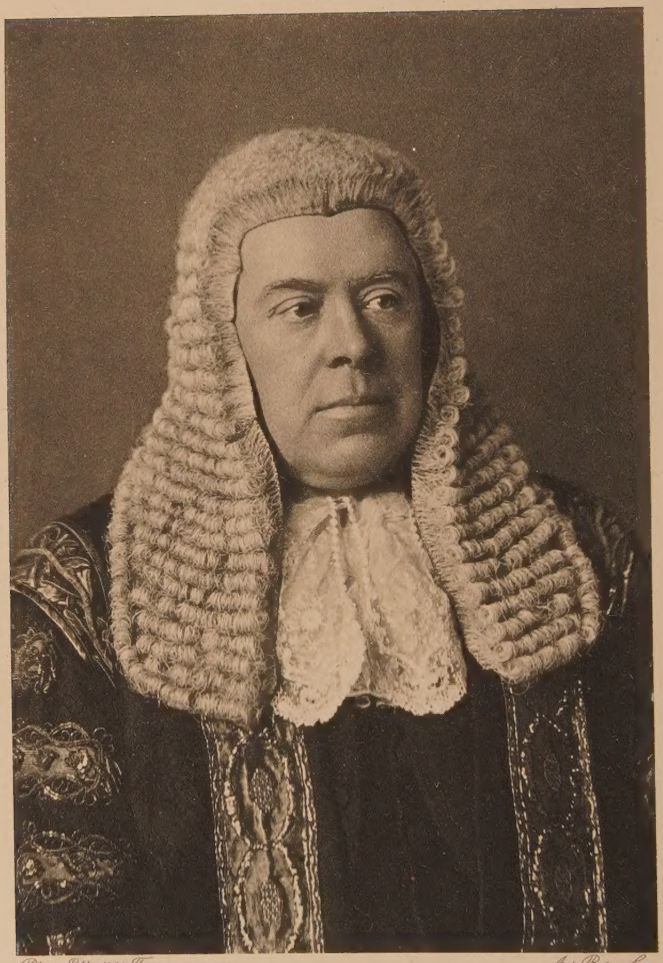

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The Rt. Hon: Lord Gorell.

THE RIGHT HON. LORD GORELL.

THE portrait in this number of the Journal is that of Lord Gorell. He has lately, with universal approbation, been raised, after a long and distinguished career as a judge, to the House of Lords. He brings to it and to the Judicial Committee not only highly trained faculties and a robust and vigorous intelligence, but, what is even rarer, an open mind and readiness to receive new light which will be of great use in considering and comprehending questions arising under the many different systems of law which come before the Judicial Committee. It is unfortunate that with so many judges long experience means incapacity to grow. From that disability of maturity Lord Gorell is free. In the Division in which he presided or sat for many years, he leaves the memory of work unsurpassed in quality by any of his predecessors, able though they were. He has of late sat often in the Court of Appeal, and to the great satisfaction of the profession, no matter what was the nature of the case before the Court. Some of his decisions are landmarks in private international law. We may refer as examples to his judgment in the Court of Appeal in *Ogden* v. *Ogden*, (1908) P. 46, in which *Sottomayer* v. *De Barros* is discussed, and *Simonin* v. *Mallac* is followed, as well as to his judgment in *Bater* v. *Bater*, in which the effect of *Lolley's* case, *Harvie* v. *Farnie*, *Le Mesurier* v. *Le Mesurier* is considered. We insert his portrait for another reason. He has at all times as a judge shown a desire to look at law in its widest aspects. An admirable technical lawyer, he has never lost sight in the administration of the law of its great aims, or failed to point out abuses and defects (see, for example, his remarks in *Balcombe* v. *Balcombe*). He has sought not only to administer it as he found it, but to make it a better instrument of justice. The list of lawyers who have been also legal reformers is not too long. Lord Gorell is among them.

FREDERIC DE MARTENS.

[*Contributed by* PROFESSOR T. E. HOLLAND, K.C.]

"MAGNUS vir cecidit" must have expressed the thought of statesmen and lawyers in all parts of the world when it became known that Frederic de Martens had died suddenly on June 20 last. To myself, as must have been the case with many others, the wholly unexpected news of the loss of a valued friend and much-respected colleague came as a sad shock. I can do no less, in obedience to a request from the editors of this Journal, than consecrate a few words to his memory.

Frederic de Martens was born in 1845 at Pernau in Livonia, an old episcopal town on the gulf of Riga. There seems no reason to suppose, as might naturally be inferred from similarity of names and occupations, that his family was connected with that which produced George Frederic de Martens (1756—1821), who in 1817 began the publication of the monumental *Recueil des traités depuis 1761*, and his nephew, Charles de Martens (1790—1863), author of the *Manuel diplomatique*, the *Causes célèbres*, etc. The subject of this notice must have lost his parents at an early age, since in 1855 he was placed in the Orphans' Institution at St. Petersburg, whence passing to the University, he became in 1869 licentiate in international law, having already, in the previous year, taken service in the Ministry for Foreign Affairs.

Thenceforward his rise was rapid. In 1871 he became Lecturer on Public Law in the Imperial Law School. In 1873 he was appointed Professor of International Law in the University, and was commissioned to edit the great collection of Russian Treaties. In 1874 he was made a permanent member of the Council of the Foreign Office, was elected member of the Institut de Droit International (of which he was Vice-President in 1885 and 1894), and was one of the Russian Delegates to the Brussels Conference on the laws and usages of war. The topic to which his attention was thus specially directed occupied him much in later years. He was always assiduous in attending the meetings of the Institut de Droit International, and served, with myself, on a committee which met in Bluntschli's house at Heidelberg, in June 1880, to put the finishing touches to Moynier's draft of the *Manuel des lois de la guerre sur terre*, which was adopted by the Institut at its Oxford meeting in September of the same year, and has largely influenced conventions subsequently made.

Yours truly

Harbert

He was one of the Russian Plenipotentiaries at both of the so-called "Peace Conferences" held at The Hague. At the Conference of 1899 he was President of the Second Committee, which produced Conventions applying the Geneva Convention to naval warfare, and codifying the laws of war on land. In 1907 he was President of the Fourth Committee, which was responsible for several Conventions dealing with war at sea. He was also a Plenipotentiary at the Conference held at Geneva in 1906 for drawing up a new Convention as to the treatment of the sick and wounded in war-time.

So greatly was he in demand as an arbitrator in international controversies as to have been jocularly described as the "Lord Chancellor of Europe." He so acted, for instance, in the Newfoundland controversy in 1891, and in the Behring Sea question in 1893. A Judge of The Hague Tribunal from its first institution, he was one of those selected to try the first case which came before it, relating to the conflicting claims of the United States and Mexico, respectively, to the "Fonds pieux des Californies"; and was similarly selected on subsequent occasions. In the Court of Appeal in cases of prize his presence was invaluable. While firmly maintaining what he conceived to be the belligerent rights of Russia, he not seldom corrected the *trop de zèle* of the Prize Courts of first instance. He accompanied the Russian delegates to Portsmouth, New Haven, and had much to do with the conclusion of the Treaty of Peace signed there on August 23, 1905. His circular mission to the chief European governments in the spring of 1907 greatly facilitated the work of the second Peace Conference, which met at The Hague in the autumn of that year; when, however, it became too apparent that the health of this great jurist and diplomatist was no longer what it had been. He was able quite recently to travel to Paris, in order to take part in awarding the Empress Mary of Russia's prizes for Red Cross work, in which he had always been deeply interested; and he attended a meeting of the Academy; but on June 20 suddenly expired, in the course of a railway journey from his country property in Livonia to St. Petersburg.

He had ever been a hard worker, and no one could come into contact with him without being deeply impressed by the extent of his knowledge, his persuasive eloquence, and his genuine zeal alike for the maintenance of peace and for the diminution of the horrors of war. He was essentially a patriot, and a faithful exponent of the humane theories of his Imperial masters; so much so, that his arguments sometimes suggested rather the diplomatist, in constant touch with his Foreign Office, than the jurist who adorned the chair of International Law at St. Petersburg. To his amiability of character I can speak with the experience not only of an intercourse of many years in the Institut de Droit International, but also of visits paid to me at Oxford, and in particular of much converse during the sittings of the Geneva Conference, at which the legal Plenipotentiaries naturally formed, for some pur-

poses, a sort of inner circle. In the plenary sittings I felt obliged to oppose, with success, the adoption in our new Convention of provisions to which De Martens attached much importance; but our friendship suffered thereby no diminution. It was only in March last that I received from him, together with a presentation copy of the latest volume (the fifteenth) of his great collection of Treaties, a long letter, dealing, *inter alia*, fully, though "quite confidentially," with recent diplomatic developments.

De Martens was a Privy Councillor, and the recipient of many high orders, Russian and foreign. He was an honorary member of the French Academy of Moral and Political Sciences, a corresponding member of the British Academy, and an honorary Doctor of Oxford, Cambridge, and Yale. His services to the cause of peace were acknowledged by the award to him in 1902 of the Nobel Prize. Some idea of his literary activity may be formed from the appended list of his writings. His portrait has already appeared in No. X. of the new series of this Journal. His son Nicholas, of the Foreign Office at St. Petersburg, was one of the assistant secretaries of the Geneva Conference, and bids fair to sustain the family reputation.

LIST OF THE WRITINGS OF FREDERIC DE MARTENS

Recueil des traités et conventions conclus par la Russie avec les puissances étrangères (avec des esquisses historiques).

—— avec l'Autriche, 5 volumes, 1874-8.

—— avec l'Allemagne, 4 volumes, 1880-8.

—— avec l'Angleterre, 3 volumes, 1892-8.

—— avec la France, 3 volumes, 1902-9.

Le droit de la propriété privée en temps de guerre (1869, en russe).

Les consuls et la juridiction consulaire en Orient (1873, en russe; en allemand, 1874).

La guerre d'Orient et la conférence de Bruxelles (en russe 1878, en français 1901).

La Russie et l'Angleterre dans l'Asie centrale (Bruxelles, 1879. Traduit en russe, allemand et anglais).

Le conflit entre la Russie et la Chine, ses origines, son développement et sa portée universelle (Bruxelles, 1880. Traduit en russe et en allemand).

La question égyptienne et le droit international (Bruxelles, 1882).

Mémoire sur le télégraphe en Chine (Copenhague, 1883).

La conférence du Congo à Berlin, et la politique coloniale des états modernes (Bruxelles, 1886).

Mémoire sur l'affaire Zappa (Athènes, 1893).

La conférence de la paix à La Haye (Paris 1901).

Par la justice vers la paix (Paris, 1907).

Traité de droit international (en russe 1882-3, 2 vols., traduit en français, 3 vols., allemand, espagnol, serbe, japonais, persan et chinois).

THE ROMAN LAW OF SLAVERY.[1]

[*Contributed by* Dr. H. Roby.]

Mr. Buckland adds a second title, "The Condition of the Slave in Private Law from Augustus to Justinian," but neither title gives adequate notice of the scope and character of the work, which seems to me a rare phenomenon, at least among English books on Roman law. It is a minute and exhaustive discussion of every matter of law, so far as slaves are concerned and their status at all affects the matter. Apparently every notice in the books of Justinian, especially the Digest, has been examined and made to contribute to the account. Works earlier than Justinian, such as Gaius, Ulpian's *Rules*, Paul's *Sententiæ*, the Theodosian and Syro-Roman Codes, have been included in the investigation. Careful references enable any one who will to test the results of Mr. Buckland's consideration. I have tested it in many places and found no occasion to blame and rarely occasion to dissent. Mr. Buckland has of course not neglected to use modern writers, chiefly foreign, but these are not so numerous as on other parts of Roman law of even less extent. In German Pandects slaves almost drop out of sight with other unpractical institutes.

For it may be admitted without regret that the subject belongs to history rather than to practical law. Slavery, at least in European countries, Turkey excepted, exists no longer, and we are not likely ever to see any treatment of the subject independent of Roman law. A slave was in the eye of the law an anomalous, many-sided creature, at once a chattel and to some extent a person. He was a thing, but a living thing, an animal capable of use and abuse, a beast of burden and an object of passion and affection; he multiplied his species, required and justified training, was necessarily subjected to discipline, confinement, and control. But he was also a man, and in the ancient world moved among free men, often indistinguishable from them. He was naturally capable of all employments and actions as much as freemen were; he had in some cases himself been a freeman, it was always possible that he might become one; but as slave he lived and worked, not for himself but for his master, whose hand and instrument he was in many dealings with others. Such a position was obviously full of

[1] *The Roman Law of Slavery.* By W. W. Buckland, of the Inner Temple, Barrister-at-Law; Fellow and Tutor of Gonville and Caius College, Cambridge. (The University Press, 1908.)

contradictions and entanglements, requiring for their regulation and solution not merely the coarse hand of a legislator, but the delicate insight and manipulation of subtle and profound lawyers. The task was well fitted to the Roman intellect, and was gradually solved with rational circumspection, and probably as much logic and completeness as the subject admitted.

There are very few institutes of Roman law which do not come into notice in connection with slaves. Slaves are sold, and subsequent discovery of defects may lead to rescission of the sale or compensation. They may be pledged and then be ill-treated by the pledgee, or run away, or steal from him, or do some wrong to others, and questions of damage or noxal surrender may arise. They may be held or possessed by others, and their children or other acquisitions may be claimed by their possessor and by their real owner. They may accumulate so-called property, and their dealings with their peculium and their contracts raise questions of great variety and difficulty. They may be made heirs in a will or be themselves bequeathed, either directly or by way of trust, and conditions may be attached to the inheritance or bequest, and further complication may arise by their being owned by more than one person, or by one having the ownership and another the usufruct. They may be summoned as witnesses and tortured, and the worth and allowance of their evidence, especially for or against their master or his family, requires special determination. They may commit crimes, and their punishment and treatment is naturally differentiated from that deemed applicable to freemen.

A further range of questions occupies the latter half of Mr. Buckland's book, turning on the modes in which freemen became slaves and slaves became free. Slavery was a punishment for some offences, and freedom was a reward by the State for some meritorious acts. But liberty was usually the result of the owner's will, either by a special proceeding before the prætor or by testament, either with a view to the slave's becoming heir or as a bequest to himself. Only imperfect liberty could be bestowed by a simple declaration oral or written, and this was amended by Justinian. Suits for establishing a man's freedom or slavery were of a special kind with appropriate incidents and procedure. Mr. Buckland has shown unwearied diligence in pursuing his subject through all the thickets of the law-books. It is perhaps ungrateful to express a regret that, as he says, the bulk of his work was so considerable as to force him to omit the allied subject of the condition of freed men.

Mr. Buckland deals in the fifth Appendix with an allied subject, the competence of a son under his father's power to manumit a slave by his father's consent. Professor Mitteis in the *Savigny-Stiftung* journal denies this competence as regards formal manumission (*vindicta*), and holds that passages in the Digest which expressly affirm it have the word *vindicta* interpolated by Tribonian, and that passages which do not contain *vindicta* should be understood of informal manumission, which Justinian made equally

valid with the other mode. Mr. Buckland, in accordance with what was the view accepted before Mitteis, contested in the *Nouvelle Revue Historique* Mitteis's views, and in this Appendix replies to Mitteis's latest statement in his *Römisches Privatrecht*, i. p. 211. On repeated consideration I am disposed now to agree with Mr. Buckland, notwithstanding that a Sinaitic solution, apparently on the authority of Ulpian, makes a son under power incapable of such a statutable procedure (*legis actio*) as is involved in a formal manumission. I cannot see why *vindicta* should have been interpolated, as Mitteis supposes, in Dig. xl. 2, l. 22; 9, l. 1531. And in xli. 1, l. 16, *causæ probatio* speaks strongly for the passage having related originally to formal manumission (cf. Gai. i. 18, compared with *ibid.* 220). Nor does it seem likely that Paul (*Sent.* i. 13a) should have said without restriction, *Filius familias jussu patris manumittere potest, matris non potest*, if it were true only of informal manumission, the two modes of manumission having in his time different effects. These passages seem to me to be sufficient to justify a refusal to accept Mitteis's argument without discussion of further passages in the same direction, but not so simple.

Throughout the book Mr. Buckland has compared the different statements attributed to the lawyers quoted in the Digest as if they were not, what Justinian meant them to be, merely mouthpieces of the one authoritative law. And our author has been awake to the possibility of this or that passage having been altered and twisted by Justinian's workmen, and thus made to speak a different doctrine from that of the second or third century. When the Justinian amendment is pretty certain, it is now marked as such in the new edition of Mommsen's stereotype Digest by Krüger. But these evident scars are far from adequately representing the corruption of the original text of the quoted lawyers. It is impossible for us now to reproduce the discussions which Tribonian (quite rightly for his own purpose) struck out altogether or even to feel any confidence that a different or later doctrine has not been put by Tribonian into the mouth of the lawyer named. Such a comparison of the Digest with the original of the authors quoted as we are able to make in some few passages, shows abundant ground for this scepticism. Yet many writers do not hesitate to theorise on the rise and development of doctrines though they have little beyond these severed and mutilated fragments to support them. Now that the new German Civil Code is law, the Digest and other books of Justinian have fallen from their high estate of authoritative law in Germany, so far at least as the new Code covers the ground. Whether they will be in active use and authority in Russian and other Sclavonic nations remains to be seen. Anyhow, the study of Roman law is now divided into two provinces, of which the most cultivated appears to aim at the reconstruction of the law of the Early Empire, not merely in Rome, but, by the aid of papyri, in the Greek and African lands. Such a study is to some minds full of interest, because full of adventurous criticism and ingenious discovery. The laws in the

Digest become to them almost as much matter for conjectural supplement as a mutilated papyrus. For them Justinian was little more than a collector of old fragments. The other province of the study of Roman law is for students of different aim and character. The hash of old lawbooks cooked and served by Tribonian and his assistants is for them a solid whole. The text given in the Digest is authoritative, and except perhaps for occasional illustration, no one need or ought to go behind it. What Labeo or Julian wrote is of little consequence; what is relevant is only the form in which Justinian has given vogue to their words. It is the law of the Byzantine Emperor's Digest, Code, Institutes, and Novels which was received as law throughout Europe, has fed and governed the legal intellect, and passed into the life and literature of mediæval and modern times. It is this which forms the kernel of the private law of Scotland, and, in a Dutch garb, of South Africa and Ceylon, and thus keeps some practical hold in English Courts.

THE GREAT JURISTS OF THE WORLD.

[*Contributed by* J. E. G. DE MONTMORENCY, ESQ.]

XI. ÉMERICH DE VATTEL.

THE late Mr. Joseph Chitty in 1834, after his relinquishment of an enormous practice at the Bar, employed part of his unfamiliar leisure in re-editing for a world that was fast forgetting the terribleness of war the English anonymous edition of Vattel's *Le Droit des Gens*, issued in 1760 and amply revised in 1797, possibly by William Cobbett, who in 1795 had translated Marten's *Law of Nations*.[1] Mr. Chitty's object was the object of every self-respecting lawyer: he desired to bring Vattel's work up to date, with special reference to the legal decisions that had sprung out of the Napoleonic and American wars. But this eminent lawyer in his retirement did not only look upon Vattel's honoured work as a book to be "noted up." The moral aspect of his labours particularly appealed to the most technical pleader that the English Bar has produced. He affirms in his preface, "without the hazard of contradiction, that every one who has attentively read this work, will admit that he has acquired a knowledge of superior sentiments, and more important information than he ever derived from any other work." Mr. Chitty indeed regarded Vattel's work not only as a book for sovereigns and statesmen but as a moral guide for every educated person. He says:

> It has been generally supposed that it is only adapted for the study of sovereigns and statesmen, and in that view certainly the author's excellent preface points out its pre-eminent importance. But it is of *infinitely more extended utility*. It contains a practical collection of ethics, principles, and rules of conduct to be observed and pursued, as well by *private individuals* as by *states*, and these of the utmost practical importance to the well-being, happiness, and ultimate and permanent

[1] Mr. Chitty had already in 1812 published a work (dedicated to Lord Erskine) entitled *A Practical Treatise on the Law of Nations, relative to the Legal Effect of War on the Commerce of Belligerents and Neutrals, and on Orders in Council and Licenses.* It is a work of importance in the history of international law. Mr. Chitty's edition of Vattel is not included in the list of his works published in the *Dictionary of National Biography*. I may add here that I have used the copy of the 1760 English version of *Le Droit des Gens* in the Cambridge University Library. Lincoln's Inn Library possesses a copy (which I have also used for the purposes of this paper) of the *Questions de Droit Naturel, et Observations sur le Traité du Droit de la Nature de M. le Baron de Wolf* of 1762. The work is rare.

advantage and benefit of all mankind; and therefore ought to be studied by *every gentleman of liberal education*, and by *youth*, in whom the best moral principles should be inculcated. The work should be familiar in the *Universities* and in every class above the inferior ranks of society.

I have quoted Mr. Chitty's enthusiastic and profusely italicised dedication of the work as this, in a sense, prepares the way for an analysis of it. It is true that this eminent lawyer's desires failed. Vattel is not perused with eagerness by every gentleman of liberal education or even by youth, while it is to be doubted if his masterpiece is familiar in any English University or in any English grade of population. It may well be that women and the inferior ranks of society, the classes so thoughtfully excused by Mr. Chitty, know as much about the genial disciple of Christian von Wolff as is known by other general or special readers. Let us see what a new dedication, a new recommendation at large, can do for this famous and suave Swiss publicist.

Émerich de Vattel was the son of David de Vattel, a minister of the Reformed Church, and his wife Marie de Montmollin, daughter of a Prussian Treasury official. He was born at Couvet in the principality of Neufchâtel on April 25, 1714. He early showed a taste for philosophic subjects, which, in common with general scholarship, he pursued at the University of Bâle. He passed on to the University of Geneva, where he finally specialised upon moral philosophy. He became an ardent student of Leibnitz and Wolff and published against Crousaz a luminous summary and defence of the Leibnitz position. This he dedicated to King Frederic II., and in 1742 he followed his book to Berlin in order to offer his services to the King whose subject he was by birth. He was rebuffed by the bluff monarch and passed on to Dresden, where his great abilities were at once recognised by the Prime Minister of Saxony, Comte de Brühl. The future jurist was placed in the diplomatic service, where his unique knowledge of the law of nations and of the history of treaties enabled him to perform services of considerable moment. It was, however, possible for him to spend some years at Neufchâtel, but in 1746 he returned to Dresden, when the King, Augustus III., appointed him adviser to the Embassy and sent him the next year to Berne as minister-plenipotentiary. He had long been composing his famous treatise *Le Droit des Gens*, and it was at Berne, amidst pleasing and congenial diplomatic duties, that he finished this work. He also during this period wrote widely on philosophy and literature, closely investigated the whole theory of natural rights and, as a relaxation, published some poems.[1]

In 1758 he returned to Dresden, was made a Privy Councillor, and became the chief adviser of the Government on foreign affairs. During the same year *Le Droit des Gens* was printed at Neufchâtel and issued with the name London on the title-page. A second edition appeared in the same year bearing the impress of Leyden. In 1762 he issued his last work:

[1] In his *Observations* he included a chapter on Tragedy and Comedy.

Questions de Droit Naturel, et Observations sur le Traité du Droit de la Nature de M. le Baron de Wolf.[1] This book, a volume of great importance, was written some years before publication and consists of material collected during the composition of *Le Droit des Gens.* We have, almost beyond doubt, further examples of Vattel's work in three volumes (of quite the first importance as historical sources) published at Frankfort and Leipsic simultaneously in 1757 and 1758. These are volumes of essays par "un observateur Hollandois." The first volume (1757) is entitled "*Mémoires pour servir à l'Histoire de notre tems*, par l'Observateur Hollandois, Rédigez et Augmentez par M. D. V." The Lord Acton Library Catalogue suggests that M. D. V. is "Monsieur de Vattel," and a careful consideration of the Preface and the Notes makes this certain. Following the preface is a "Dissertation sur la Raison de la Guerre," by the jurist Strube, which was almost certainly selected for insertion by Vattel. Vattel's preface is a wonderful piece of writing in which he advocates the formation of a United States of Europe, in which no single state is to be allowed to have a predominating power. This volume consists of twenty essays. The second volume (bound up, in Lord Acton's collection, with the first) is entitled "*Mémoires pour servir à l'Histoire de notre tems, par rapport à la Guerre Anglo-Gallicane*, par l'Observateur Hollandois, Rédigez et Augmentez par M. D. V." (1757). The third volume is entitled "*Mémoires pour servir à l'Histoire de notre tems, où l'on deduit historiquement le Droit et le Fait de la Guerre Sanglante qui trouble actuellement toute l'Europe*, par l'Observateur Hollandois, Rédigez et Augmentez par M. D. V." (1758). From 1762 onwards his official position in the Court of Saxony and the new interests of his home life rendered further juridical work impossible.

It was not until late in life that he married, on January 27, 1764, at Dresden, Mademoiselle Marianne de Chesne, a member of a noble French family which had settled in Saxony. A son was born on January 31, 1765, who died in the year 1827. Vattel only lived for about four years after his marriage. The strain of his official work proved very great, and in 1766 he broke down and retired for rest to his native district, Neufchâtel. In the autumn, with characteristic energy, he returned to Dresden and resumed his duties. In the following year he broke down again and once more sought relief at Neufchâtel. But it was too late, and he died on December 28, 1767, in his sixty-fourth year. Vattel left behind him an annotated copy of the first edition of *Le Droit des Gens*, and an edition crudely incorporating these notes was issued from Neufchâtel in 1773.

[1] A Berne, chez la Société Typographique MDCCLXII. I think that the first edition of *Le Droit des Gens* is clearly the "London" edition, for it has at the end of the second volume a list of *Errata* which in the "Leyden" edition have been duly corrected. Throu gh the kindness of Dr. T. A. Walker, of Peterhouse, Cambridge, I have been able to compare the "London" edition in the Peterhouse Library with the "Leyden" edition (two volumes in one) in Dr. Walker's fine collection of works on the Law of Nations. He also lent me Mr. Chitty's work of 1812.

The volume, in the hands of a critic, is invaluable as reflecting the jurist's latest views, but it was issued in a form that would have revolted his fine sense of style and order. The editor of the edition of 1775 indeed comments in terms of great severity on this edition, and declares that it "devrait être abandonné à l'épicier comme vraie maculature."

In considering Vattel's work it will probably be found convenient to make some detailed examination of the *Questions de Droit Naturel, et Observations sur le Traité du Droit de la Nature de M. le Baron de Wolf*, since this remarkable volume contains most of the material on which *Le Droit des Gens* was based and reveals the jurist at work collecting his materials, sorting his ideas, and criticising the intellectual position of his great master Wolff. The work shows us the shrewd utilitarianism that was the salient intellectual characteristic of Vattel. There never was a shrewder mind. He has all the logical clearness and hardness of Bentham, and is as inelastic as that eminent thinker. He is in point of time and thought the predecessor of Bentham, whose doctrine of utility appears largely written throughout these *Observations*. Vattel indeed enunciates the aphorism of the "greatest good of the greatest number" in almost similar words. Yet, reading Vattel, there seems a great gulf fixed between him and the English utilitarians. His doctrine is so wrapped up in elegant writing and precious sentimentalism that the bitter pill is swallowed before the victim has any knowledge of the fact. That was not Bentham's way. Bentham had to be translated into French by Dumont, and re-translated into English before the great British public would have anything to do with his philosophic nostrums. Vattel at once found his audience, and an English edition appeared, as we have seen, in 1760, within two years of the publication of the original work. A German edition (from the pen of J. P. Schulin) also appeared in 1760,[1] simultaneously at Frankfort and Leipsic, thus recalling the "Acton" volumes referred to above. He, moreover, appealed directly to the religious sense, deliberately limiting his utilitarianism to the natural inter-relations of men. He recognised, as standing out above and enveloping these relations, the love of God to which men could turn, and in the glow of which they could transform the pure selfishness of natural law into the pure altruism of supernatural law. The passage in which he describes this transition shows the idealism that underlay the utilitarianism of his philosophy. This idealism is continually in sight, and adds a vivid interest to almost every proposition that he advances. When we have a utilitarianism that is the necessary but not the last resort of the human soul, humanity

[1] The English editions of 1760, 1797, and 1834 are not, it would seem, included in Klüber's Bibliography (*Dans le Droit des Gens Moderne de l'Europe*, édit. Guillaumin, 1861, p. 446). See M. P. Pradier-Fodéré's edition of *Le Droit des Gens* (Paris, 1863), vol. i. p. xiii. (n.). This edition is probably the best and is largely followed here so far as the text and the facts of Vattel's life are concerned. But see also Hoffmann's edition of 1835, containing Sir James Macintosh's Essay on the Law of Nature and Nations.

feels that it can adopt it without a sense of shame. Indeed, as we have seen, Mr. Chitty adopted it with a sense of enthusiasm.

In considering the *Observations* we may dismiss Vattel's profuse apologies for venturing to criticise his great master, Wolff, without further comment than the remark that local anæsthetics of this type are very characteristic of our author. He does not spare the scalpel, but skilfully manages to convey the impression that it hurts the surgeon more than the patient. Indeed such was his respect for Wolff that probably this was true. The work opens with the end and aim of Being. Our first and most general obligation, the foundation of all other obligations, is to work for our individual happiness and well-being. Now perfection alone can secure perfect happiness. Therefore, each must work for his own perfection, and this can only be done by acquiring and practising virtue. How near, he asks, does this natural ideal approach the Christian ideal? Have we, for instance, a natural duty to love our enemies? This is discussed in a remarkable passage:

Nous nous aimons premièrement nous-mêmes, et nous nous devons, préférablement à tous, le soin de notre conservation et celui d'avancer notre perfection. Mais l'homme ne pouvant se suffire à soi-même, se conserver et se perfectionner seul et sans le secours de ses semblables, la nature et l'essence des hommes les obligent à s'aider réciproquement, et il faut qu'ils y soient sincèrement et constamment disposés: d'où il suit, qu'ils doivent s'aimer les uns les autres. Mais l'amour que je dois aux autres ne dérivant que de celui que je me dois à moi-même, il cède à celui-ci et ne peut jamais lui nuire. Si un homme rompt les liens qui doivent nous unir, et se déclare mon ennemi, cherchant à me nuire, bien loin de m'aider, il m'est permis de faire contre lui tout ce qui est nécessaire à ma défense et à ma sûreté. Mais comme cette division est un mal dans la société humaine, et un mal pour moi-même, je dois faire mon possible pour empêcher qu'elle ne s'aigrisse, et pour la finir entièrement; et rien n'y contribuera davantage que ma modération dans ma juste défense, et la générosité avec laquelle je rendrai, dans l'occasion, à mon ennemi même les devoirs de l'humanité, et lui ferai tous les biens qui ne contribueront pas à le mettre mieux en état de me nuire, ou à lui donner, et à ses pareils, plus de hardiesse à m'attaquer (pp. 35-6).

We cannot go farther than that if we base our actions on the simple nature and essence of men in their mutual relations. If you desire more than this you must turn to the love of God. If the heart, Vattel adds, is actually inflamed with that love, then it is really possible to love your enemies. Morality can only be carried to its highest point of perfection by the aid of a just conception of the supernatural. Vattel then elaborates an utilitarian system of psychology based on the relations of men. The system is empirical, and Vattel entirely declines to adopt Wolff's great attempt to apply mathematical thought to the moral sciences. The basis of his system of humanitarianism is that the "right" of demanding help from other men is a "perfect right," inasmuch as there is joined to it the right of constraining those who refuse to allow a man to exercise this right.

The first part of the book concludes with a discussion of the measure of damages caused by a wrongful act. There must be a certain proportion between the punishment and the crime. This proportion must be maintained even if the punishment will not prevent the wrongdoing. If capital punishment only will prevent apple-stealing from an orchard, the loss must be tolerated. A man has a duty to preserve and protect, not only himself but others, and if the loss in question is of less importance to a man's perfection than kindly conduct, then the loss must be suffered. If, however, it is found that certain offences become common it may be necessary to inflict penalties out of proportion to the offences in order to preserve society.

The second part deals with certain elementary propositions. Vattel discusses the difference in a primitive community between the gifts of nature and the fruits of industry. The first are held in common by the whole community, but each man has "un droit de préférence sur les fruits de son industrie et de son travail." The result, in the end, is the dissolution of primitive conditions. A man cultivates a piece of land; discovers that he has a special right to the fruits of the field, and appropriates them; insensibly he acquires a right to the field itself, and his successors continue to hold it. In this demonstration we see clearly enough the peculiar vice of eighteenth-century speculation. Had Vattel not been content to reason from the necessarily sophisticated outlook of his own age and class, but had turned to the examination of the village communities within his reach, he would have seen that, in fact, his theory was absolutely untrue; that the appropriation of the fruits of the soil had gone on for untold centuries without individual appropriation of the soil. Vattel attacks Wolff's theory of the origin of property and ownership as a result of the exercise of natural liberty and apparent needs, but his own generalisation is far less convincing. It is as follows: As the race multiplied the simple products of the earth ceased to be sufficient; industry and art became necessary; foreseeing men began to provide against the future, and to cultivate fields instead of roaming at large. A general right to everything existed, so these men could not be restrained from taking a particular portion of land and renouncing the rest. They thereupon acquired the right to the produce of this soil. Others followed their example: "voilà la *propriété* et le *domaine* établis." In the light of modern investigations it is probable that Wolff's speculations are nearer the truth than those of Vattel. But the subject is not one for speculation at all. It is a question of fact to be ascertained in accordance with correct laws of evidence.

The Third Part discusses some interesting questions of contract and lays down two propositions of natural law: first, that no one can be presumed to have abandoned property; and secondly, that a holder in good faith must be protected.

The Fourth Part continues the discussion of contracts, raising questions of curious interest such as, can a man accept an offer by silence?

must a seller point out the patent faults of his goods? In the latter case Vattel is apparently guided by the maxim *caveat emptor*. The discussion as to accidental injury to a workman is interesting. The employer is responsible, in the case of a hired workman, but not where the work is done by a contractor.

The Fifth Part continues the discussion of special cases. Are lotteries allowable by the law of nature? Vattel, in opposition to Wolff, declares that they are allowable. Again Vattel upholds in principle contracts of insurance made in good faith after the event. He agrees that it is illegal to agree to terminate a difference by a duel. He declares that a vendor of land can reserve a right of passage over it for the use of a neighbour. Problems of these various types are, of course, familiar to English lawyers.

In the Sixth Part, after a discussion of certain questions relating to land (such as the right to the surface) Vattel proceeds to discuss the law of necessity. He is surprisingly and admirably uncompromising as to the limits of lawful action in cases of necessity. He lays down the definite principle: "qu'il ne nous est jamais permis de faire tort à quelqu'un, d'aller contre son droit bien établi." There is a right to do all things that are not illegal in themselves or contrary to the absolute right of another person. For instance, you may *kill* an aggressor because he began the evil, and has not an exclusive right to preserve his own life. But you must not kill a defenceless person for the purposes of food in a case of desperate necessity, unless he voluntarily consents to sacrifice himself for others.

Wolff denies this last position (s. 587) on the ground that a man has no right over his own life and therefore cannot consent to give it up. This, as Vattel points out, is illogical since the same argument would forbid a man to sacrifice his life for his country. Wolff, while declaring that a boatful of men ought rather to die of hunger than feed upon each other, yet allows a party to make a hopeless sally to save a town. Vattel will have none of this. "Je ne voudrois donc pas dire qu'un homme n'est point le maître de sa propre vie; mais je dirois, qu'il est obligé de la conserver précieusement, à moins qu'il n'ait des raisons très-fortes et très importantes de l'exposer, ou même de la sacrifier." The general rule of necessity is stated as follows: "Il faut choisir le plus grand bien, ou le moindre mal; mais en considérant la chose dans toute son étendue, avec toutes les liaisons et toutes ses conséquences et dépendances. Car la décision ne doit pas se fonder seulement sur le cas présent, considérée en lui-même et indépendamment de ses conséquences dans le monde." Vattel proceeds to exemplify this doctrine by a protest against the use of poisoned weapons—a use that had been justified by Wolff. If the use established itself, "la guerre deviendroit atroce, ses maux n'auroient plus de bornes, et elle seroit capable de détruire le genre-humain" (p. 213). But does not this argument destroy itself and re-establish Wolff's position? The more terrible war is made, the less likely it is to be waged. The argument against poisoned weapons applies, if it applies at all, with renewed

force to the use of airships from which explosives can be poured upon defenceless towns, involving combatants and non-combatants in irretrievable destruction. The whole tendency of war is to become more terrible and, in fact, less frequent and less destructive. War was far more bloody when it resolved itself into a vast number of single duels fought *à outrance* according to highly artificial rules. According to Vattel's own principles, the more terrible war is made the more likely is it to fulfil the laws of nature and secure peace.

The Seventh Part opens with an interesting discussion of the manner of counting votes. Here Vattel follows Grotius and not Wolff. The principle laid down is that those who have *any* opinion in common must be ranged together for the purpose of arriving at a decision. Thus if four judges condemn a man to death, two to banishment, two to a thousand crown fine, two to a hundred crown fine, and three are for an acquittal; we have *nine* in favour of life against *four* in favour of death; but *ten* are in favour of some form of punishment, while only *three* are in favour of freedom. So the man must live, but must be punished. *Six* are in favour of death or banishment, and *seven* in favour of something else. Therefore the punishment must be a fine, and the higher fine, since eight are in favour of that *at least*—for the greater includes the less. So the man is fined a thousand crowns. It is an interesting discussion, but it leaves out of account the fundamental problem, why should a majority carry the day? Counting by heads is surely not the result of the law of nature, for, in fact, in nature it is always one head that dominates the rest. The rule is presumably a rule of convenience which in fact gives the law of intellectual dominance full play while it creates that illusory atmosphere of equality which is so dear to the human heart. But it is necessary to lay stress on the fact that there is no natural law which gives a special sanction to the decision of majorities, though possibly there are signs of conventions on the subject in the earliest stages of tribal life. The elemental man had no respect for liberty, equality, or fraternity outside his clan or kinship bond or hunting troop; while inside that fundamental unit *ex hypothesi* none of these things existed. In their place was chieftainship, the *Manus*, the system of slavery.[1] The idea of equality was entirely remote from tribal life, and consequently the democratic idea of government by majorities was non-existent. But there was, as there is to-day, a primary force or passion (the existence of which is acutely recognised by Vattel) which tended to create a conventional recognition of human equality. I refer to the passion of jealousy. A force so dis-

[1] It is to be noticed that while Wolff denies that slavery existed in primitive communities, Vattel declares that the slave could come into existence as soon as other sorts of property. The right to kill involves the lesser right to enslave. Vattel's assertion that parents have no natural right over the lives and liberty of their children must be met by the answer that for untold years they in fact exercised such rights. No doubt this was wrong, but was it more unnatural than the right to die which is supported by Vattel?

ruptive had to be met by definite structural variations in social life. Consciously or unconsciously the fiction of equality was introduced to combat this universal force or passion. If men could be led to believe that they were equal, society could maintain stable equilibrium. Out of this transparent fiction an ideal of real equality emerged, and human society through long ages has made from age to age desperate efforts to realise on earth the platonic pattern of a divine society laid up in Heaven. To-day the fiction is as transparent as ever, but the ideal has at last descended from a transcendental Heaven into the heart of man, and to-day efforts, unprecedented in the history of mankind, are in progress to secure a real equality among the sons of men.

Vattel is full of interest when he turns from the doctrine of human equality to the subject of women. He sees here, at any rate, no equality, nor has he, despite his suavity, any illusions. He sees nothing fundamental in the doctrine of monogamy. He denies that the laws of nature forbid plurality of wives, though he admits the inexpediency, in most cases, of polygamy. In certain cases, however, he admits its use and possibly its necessity, while he thinks that concubinage can quite well be legalised. He claims that a man should be allowed a divorce for sterility, and asserts that marriage is never indissoluble in itself but that natural law imposes on us the obligation never to break it without strong and just reasons, especially if there are children. His treatment of this subject is a striking instance of the luminous way in which he applies the principle of utilitarianism to human problems. It is from the utilitarian standpoint that he goes on to inquire as to the person to whom authority belongs in marriage. It is curious that a question which is creating such unpleasant interest in the present day should have been discussed with such gusto more than a century and a half ago. M. de Vattel would not have been popular with the army of women who are demanding the franchise to-day. His cold reasoning and his uncompromising views on the superiority of the male sex would have caused pain in many sensitive hearts. Far otherwise would it be were M. Christian de Wolff suddenly to glide once more on to the platform of life with his thrilling declaration: "Le Droit Naturel établit une parfaite égalité entre le mari et la femme" and his emphatic repudiation of the predominance of the male sex. The text of Vattel's disagreement with his great master deserves to be reprinted: He asserts that men are "plus capables des affaires importantes, plus fermes, plus forts et plus courageux. Il paroît donc que la nature a destiné la femme à vivre sous la protection du mari, et cette protection donne déjà une supériorité." Some one, says this jurist, even then trembling on the verge of matrimony, must lead and that one must be the stronger. "Dans une pareille société, dis-je, celui qui est le plus capable ait le droit de décider, en cas de partage dans les sentimens." Then follows the touch of sentiment that is intended to sweeten the bitter draught. The husband must use his superiority "avec douceur,

avec sagesse et avec équité, pour l'avantage commun." Vattel is not as wise as usual here; some things in life should be taken for granted. But he adds, to cure all, "outre l'amour et les soins que le mari lui doit, elle a ses droits, qu'il est obligé de respecter."[1] Wolff's answer, of course, would have been that Vattel was begging the question, that he was constructing a universal argument from his own very imperfect knowledge of the past, when in fact the law of nature depends as much on the potentiality of women as on their actual achievement. You cannot, for instance, argue that there is a law of nature asserting that the negro is necessarily inferior to the Aryan. Wolff in asserting the equality of the sexes no doubt wrote as a theorist, while Vattel in denying the equality wrote as a practical utilitarian. But the weakness of the utilitarian position is that while it necessarily depends on the appeal to experience, it invariably appeals to a very limited experience. If experience were exhaustive, the idealist and the utilitarian would be at one. But as it is, there can be no finality about the utilitarian position, which shifts in the direction of idealism as the ages pass and knowledge increases.

It is very difficult to ascertain how Vattel formulated his laws of nature. We have seen that he holds it to be unnatural for a parent to enslave or kill his child. On the other hand, he holds that though the giving of a bad example by a parent is a great fault, it is not such an infringement of a natural law as to constitute a natural injury. Now no doubt this distinction does exist in municipal law. Until this very year a drunken mother could carry her children with her to any tavern in the land, and they not infrequently shared her libations from their tenderest infancy. Moreover it was decided as long ago as February 25, 1796, in the deservedly immortal case of *Hodges* v. *Hodges*,[2] that the common law of England imposed upon parents no duty to educate their children. Lord Kenyon stated the legal position in the words, "A father was bound by every social tie to give the children an education suitable to their rank, but it was a duty of imperfect obligation, and could not be enforced in a court of law." It was not until August 15, 1876, that the legislature turned this "duty of imperfect obligation" into a duty enforceable in a court of law by declaring that "it shall be the duty of the parent of every child to cause such child to receive efficient elementary instruction in reading, writing, and arithmetic, and if such parent fail to perform such duty, he shall be liable to such orders and penalties as are provided by the Act."[3] The tendency of municipal law to-day is in the direction of enlarging the imperfect obligations of natural law; but still, of course, the distinction between the two is very marked. Yet how natural law can regard as not naturally injurious conduct on the part of a parent that leads a child directly into the very mischiefs aimed at by the im-

[1] It should be noticed that in the eighth part he asserts (against Wolff) that women are far less capable of public government than men (p. 355).

[2] Peake's *Reports of Cases at Nisi Prius*, vol. ii. p. 79.

[3] The Elementary Education Act, 1876 (39 & 40 Vict. c. 79), s. 4.

perfect obligations of natural law as well as by municipal law it is not easy to see, especially if we adopt as the basis of all natural law the dogma that the ultimate obligation of man is so to acquire and practise virtue as to secure that personal perfection which is essential to complete personal happiness. The truth is that Vattel only develops the premisses on which he bases his theory of natural law so far as that development does not interfere with his own preconceived notions of what is likely to be useful in the evolution of society. If his absolutely artificial utilitarian standard does not square with the logical results of the premisses from which he starts in reconstructing the evolution of society, those results are abandoned. This is the necessary and the vicious consequence of the *a priori* method. It is all very well to have a Theory of Evolution and check it and correct by historical tests, but it is quite another thing to have a Theory of Evolution and a Theory of Social Life and to attempt to check and correct one theory by the other. The appeal to experience is the only test, and this applies in the realm of natural juridical conceptions as truly as in the realm of material energy and force.

It is interesting to see how Vattel is faced with these difficulties when he tries to explain why marriages between ascendants and descendants are contrary to natural law. He flings aside Wolff's theory that such marriages are forbidden by respect and reverence, and says that they are inexpedient, against the law of perfection, likely to be barren and occasion natural horror. His own theory is not in the least convincing. He begins by saying that they are contrary to the law or theory of utility; he goes on to say that they infringe the law of perfection on which his social scheme is based—thus attempting by mere assertion to bring his two theories into accord; he then makes a desperate appeal to experience, without any knowledge that justifies the appeal; and finally really falls back on Wolff's theory, on the theory elaborated in *Œdipus the King*. Now what Vattel failed to recognise was that mere utilitarianism—natural utilitarianism—is incapable of solving problems that involve the spiritual depths of human nature. A transcendental element is involved which is not explained by a reference to "natural horror." This element was no doubt evolved from some utilitarian basis; but once in existence it regulates the behaviour of the whole scale of creation that possesses it in a way that does not apply to a lower scale. Love itself has its roots on earth though its flowers and fruits belong to a region of self-sacrifice that can only be called transcendental. The relation of human parent and child is regulated by this transcendental love; physical relations are in fact replaced by metaphysical relations, and any tendency to reverse the process long since became so impossible as to be unnatural even in the case of an adopted child. Vattel's attempt to create a great gulf between the physical and the metaphysical has made it impossible for him to supply a metaphysic of social life. Wolff refused to cut himself off from this means of analysis, with the result that he finds the true solution.

Each of these jurists might well have based their discussion of the right of inheritance on the same ground—that the relationship of parent and child is such as to involve perfect continuity of possession. This is evidently in Wolff's mind when he asserts that the right of inheritance is a complete right. Vattel, with singular lack of historical knowledge, denies this on the ground that such a theory destroys the natural right of will-making. He therefore compromises with his master by asserting that a child has a "perfect right" to succeed to a portion of the estate of his parent, a portion determined by circumstances; and that a parent has an equal right to the heritage of his childless child (p. 295). Here we have arbitrary utilitarianism running havoc among all analyses and all history. There is nothing elemental in the power of will-making. Primitive races know nothing of it. There is something primitive in the notion of transmission to children, and the practice of the earliest races coincides with what we might expect to be the case from the transcendental relationship of human parent and child or even adoptive child. Vattel's law of perfection would indeed seem to involve this transmission of property from parent to child which Wolff asserts to be a "perfect right."

In the Eighth Part Vattel turns to the question of sovereignty. He does not accept the divine right of kings. The only sovereign is the community itself, which is capable of delegating its power but not of finally parting with that power. The people, he asserts, always hold the reversion of power even if that reversion is not nominally reserved, and can resume, for just cause, their rights. No man can possess a patrimonial kingdom. "Le peuple seul, j'entens le peuple entier et unanime, possède l'empire comme véritablement patrimonial" (p. 343). The patrimony is not in a majority of the people but in the whole people.[1] The rights of a majority are merely rights of expediency, he in effect says. It is therefore necessary to submit to the majority in a state even if the fact involves some injustice. But this is not so if the majority becomes oppressive and destructive. It is curious to see how Vattel's mind is continually wavering between his theories of utilitarianism and perfection. Having made his doctrine of sovereignty clear, he goes on to state that if a people unanimously elect a despot, the contract will bind them but will not bind the children of the original electors. This, of course, is a compromise, but it is quite inconsistent with the original proposition that a reversion of power is always sleeping *in gremio populi*. That this latter proposition is the one that he finally holds is shown by his subsequent statement that the people have the right to decide between two pretenders to the crown. He has much that is very significant on the question of state religions. The priesthood must not be independent: "Mais si vous les rendez indépendantes de la puissance Civile, vous ouvrez la porte à mille désordres, à des troubles dangereux; et les Rois ne font pas fermes sur leur Trône" (p. 319). But

[1] It should be noticed that here Vattel appreciates the fundamental difficulty discussed above of the question of natural rights residing in a majority.

while the State must control the priesthood it must not lend itself to acts of uniformity: "La Société, ou le souverain qui la représente, n'a donc aucun droit de gêner la conscience des citoyens" (p. 370). There we must leave Vattel's *Observations*, a work of originality and insight that deserves to be reprinted, for it contains the seeds of most of the thought that dominated Europe and England from 1789 to 1830.

The above analysis of Vattel's fundamental ideas will enable us to treat with brevity his great work *Le Droit des Gens*. It is not difficult to see how, from the premisses set out above, he would apply the laws of nature to the inter-relations of sovereign peoples. His preface opens with the magnificent untruth which the Institutes of the Emperor Justinian enunciated for all time: *jure enim naturali ab initio omnes homines liberi nascebantur;*[1] a legal fiction which in the evolution of things will at last become a natural truth. He refers to Thomas Hobbes as being the first to give a distinct though imperfect notion of the rights of nations. But Wolff and Vattel differ from Grotius, Hobbes, Puffendorf and Barbeyrac in seeing that the law of nature dealing with individuals must be modified if it is to be applied to political societies. Such societies are moral persons, but they differ in their nature from the moral man. Closely as Vattel follows Wolff he is careful to point out the many fundamental differences between them. Wolff asserted the existence of patrimonial kingdoms; Vattel will have none of them; Wolff justified the use of poisoned weapons; Vattel will have none of them either. But a deeper difference exists. Wolff derives the idea of a voluntary society from a kind of mighty republic founded by nature herself, a universal society of which all the nations of the world are members. Consequently the civil law of the natural republic of men would be the law of all its members. "Cette idée," writes Vattel, "ne me satisfait point, et je ne trouve la fiction d'une pareille république ni bien juste, ni assez solide pour en déduire les règles d'un droit des gens universel et nécessairement admis entre les États souverains."[2] He can recognise no other natural society among nations than nature has established among all men. It is the essence of all civil society that each member has ceded a part of his rights to the whole body which possesses authority over all the members. "On ne peut rien concevoir ni rien supposer de semblable entre les nations. Chaque État souverain se prétend, et est effectivement indépendant de tous les autres." The laws that apply to nations differ from those that apply to men, since a nation is a different type of moral being from a man. But it has, nevertheless, fundamental and necessary laws which are purely natural in their origin, and these are supplemented by voluntary laws of convenience. Vattel elaborates this position as follows (I use Mr. Chitty's revised version):

The necessary and the voluntary laws of nations are therefore both established by nature, but each in a different manner: the former, as a sacred law which nations

[1] *Institutionum Libri Quattuor*, lib. i. tit. 2. [2] But it was his goal (see p. 19 above).

and sovereigns are bound to respect and follow in all their actions; the latter, as a rule which the general welfare and safety oblige them to admit in their transactions with each other. The necessary law immediately proceeds from nature; and that common mother of mankind recommends the observance of the voluntary law of nations, in consideration of the state in which nations stand with respect to each other, and for the advantage of their affairs. This double law, founded on certain and invariable principles, is susceptible of demonstration, and will constitute the principal object of this work.

It is necessary before going on to deal with this demonstration to draw attention once more to the fact that Vattel's mind fails to appreciate the profundity of Wolff's intellect. Vattel, in his elegant apologetic way, which perhaps recalls the critical manner of Sainte-Beuve, spurns Wolff's fundamental assumption of a universal republic instituted by Nature herself of which all nations of the world are members. Far be it from me to assert, or to deny, the validity of such an assumption. I am certainly not prepared to deny the assumption, for it is, in fact, merely the traditional mediæval form of asserting the universal brotherhood of man—an assertion which appeals with singular attraction to the modern mind. Vattel, however, repudiates the assumption, and he is undoubtedly at liberty to do so; but he proceeds to make a new assumption which involves every intellectual difficulty presented by Wolff's assumption and new difficulties as well. He assumes that a nation is a moral being, one and indivisible. I do not desire to challenge this assumption—if we are to be in the land of assumptions at all. It is certainly desirable that nations should be moral beings, and probably the best way to make them so is to assume that they are so. But Wolff's assumption is likely in the long run to prove nearer truth. The world is probably drifting or gliding in glacier-fashion towards that universal republic of which nations are the members, that the great German philosopher evolved from his inner consciousness. "M. D. V." in fact advocated the creation of such a Republic. And we must remember that those juridical thinkers who enunciated from the days of Augustine onwards the laws of nature in society were, in fact, looking towards the end and not the beginning, were looking for what should be when they thought that they were looking for what had been; that they were platonic idealists without knowing it; that the pattern laid up in the heaven of their high imaginings was what they saw, and that our modern investigations into actual primitive conditions had and could have no meaning or attraction for them. When they wrote of the law of nature they meant, each according to their respective spiritual insight and intellectual gifts, what Plato, what Augustine, what Dante, what Sir Thomas More meant. No doubt they thought they were dealing with reality; but so, for the matter of that, did Euclid. If, then, Wolff and Vattel were dealing not with reality but with ideals that each desired to bring down into the realm of actualities, Wolff was incomparably the greater thinker. A universal republic is a higher ideal

than a family of nations whose morality is exhibited in bloody feuds, in inextinguishable hatreds, in malice, jealousy and lust for power: in every possible telescopic magnification of the vices of petty tribal life. It is not unjust to make this criticism of Vattel's position, for that position is a persistent criticism of a nobler ideal than his own, a criticism adopted for the purpose of creating a purely utilitarian system of international relations, a system that to this hour has hampered a larger outlook on the relations of organised communities. Limited utilitarian ideals, that is to say, the hand-to-mouth wisdom of practical politicians, are the ideals that Vattel, a rather shamefaced follower of a much greater thinker of the same type, Machiavelli, crystallised for the use of the Foreign Offices of Europe for a century and a half after his death. Vattel was essentially a diplomat, and he chose, as his fundamental assumption, the highest ideals consistent with practical political life. Having done that, he plunges into current political problems and shapes his course in accordance with the apparent needs of the times. He takes a new and most useful attitude towards these problems. He is above all a practical man, and therefore he abandons the stale precedents of the classical ages and uses modern instances of the clearest kind. "I have quoted the chief part of my examples from modern history, as well because these are more interesting, as to avoid a repetition of those which have already been accumulated by Grotius, Puffendorf, and their commentators." But it cannot be said that his examples encourage reliance on his fundamental propositions.

Let me now briefly refer to Vattel's definitions in the realm of the law of nations. "Nations or states are bodies politic, societies of men united together for the purpose of promoting their mutual safety and advantage by the joint efforts of their combined strength." Such a society, we are told, is a moral person susceptible of obligations and rights. The law of nations is a science which teaches the rights subsisting between nations and the obligations corresponding to those rights. Nations are to be considered as so many free persons living together in the state of nature. The entire nation (whose common will is but the result of the united will of the citizens) remains subject to the laws of nature: consequently the law of nations is originally no other than the law of nature applied to nations. This application gives us the necessary Law of Nations called by Grotius "the internal law of nations" and by other jurists "the natural law of nations." Every treaty and every custom which contravenes the injunctions or prohibitions of the *necessary* law of nations is unlawful and condemned by the law of conscience even if validated by the external law. A nation is obliged to live on the same terms with other nations as an individual man was obliged, before the establishment of nations, to live with other men. A man when he joins a nation is still bound by his duties to the rest of mankind. Men, adds Vattel, are naturally equal and a perfect equality prevails in their rights and obligations, as equally proceeding from nature.

It would answer no purpose here further to dwell on the unscientific nature of these various assumptions. I pass at once to the general laws that Vattel derives from his definitions. He tells us that each individual nation is bound to contribute everything in her power to the happiness and perfection of all other nations. But each nation should be left in the peaceable enjoyment of that liberty which she inherits from Nature. It follows also from the natural equality of all men that nations, being composed of free persons living together in a state of nature, are naturally equal and inherit from Nature the same obligations and rights. It also follows that a nation is mistress of her own actions so long as they do not affect the progress and perfect rights of any other nation. These and their derivatives are the Natural Law of Nations. It is a necessary, a natural, an internal law binding the national moral conscience. The external law corresponding to this internal law is the Voluntary Law deliberately adopted by nations, which as supplemented by Conventional Law (that is to say, the law contained in treaties) and Customary Law, constitutes the Positive Law of Nations. This argument concludes with a characteristic passage: "As the *Necessary* law is always obligatory on the *conscience*, a nation ought never to lose sight of it in deliberating on the line of conduct she is to pursue in order to fulfil her duty; but when there is a question of examining what she may demand of other States, she must consult the *Voluntary* law whose maxims are devoted to the safety and advantage of the universal society of mankind." This passage exhibits clearly enough the real difficulty that Vattel (and indeed his predecessors in thought) had not the courage to face. Vattel is in reality searching for a sanction to his law. He felt as strongly as Austin felt that a law involves a law-giver, and in fact he invents a sanction for the Positive Law of Nations by creating behind it the Interior Law of Nations. We see at once why he has to postulate a moral consciousness in a nation. It is necessary to find a sanction, and so in Kantian fashion, though in pre-Kantian days, he evolves his necessary laws that bind the consciousness of the moral beings that he has created. Unlike Frankenstein, he was not doomed to see these beings hurling aside their moral consciousness and their internal laws in the very name of the Natural Code that he, scarcely less than Rousseau, helped to frame: Napoleon Buonaparte was not yet rocking in his Corsican cradle when Émerich de Vattel was so complacently pondering on these things.

Having established what seemed to him the unimpugnable basis of the family of nations, Vattel with serene logic unfolded the necessary scheme of things. A nation, as he defines it, involves a Public Authority to order and direct what is to be done by each man in relation to the end of this association of men. "The political authority is the sovereignty; and he or they who are invested with it are the sovereign." There are three kinds of sovereignty—a Democracy or Popular Government, an Aristocratic Republic represented by a Senate, and a Monarchy represented by a single person. Since "to

preserve and to perfect his own nature" is the sum of all the duties of a moral being to himself, so it must be with a nation. "The preservation of a nation consists in the duration of the political association by which it is formed," and the perfection of a nation is found when everything in it must conspire "to procure for the citizens whatever they stand in need of for the necessities, the conveniences, the accommodation of life, and, in general, whatever constitutes happiness—with the peaceful possession of property, a method of obtaining justice with security, and, finally, a mutual defence against all external violence." A nation is under an obligation to preserve itself and its members, and it has a right to everything necessary to its preservation that is not unjust in itself or absolutely forbidden by the law of nature. "The second general duty of a nation towards itself is to labour at its own perfection and that of its state." The individual citizen must also strive towards the end. Vattel points to England as the nation that has realised his ideals, and there is not a flicker of his diplomatic eye as he does so. Indeed England, England in her eighteenth-century deadness and corruption, is to him a standard nation. "Heureuse constitution! à laquelle on n'a pu parvenir tout d'un coup; qui a coûté, il est vrai, des ruisseaux de sang, mais que l'on n'a point achetée trop cher." And he adds with a touch, one is tempted to think, of irony but more probably in sheer earnestness, "Puisse le luxe, cette peste fatale aux vertus mâles et patriotiques, ce ministre de corruption si funeste à la liberté, ne renverser jamais un monument honorable à l'humanité, monument capable d'apprendre aux rois combien il est glorieux de commander à un peuple libre." The praise of one's friends is sometimes hard to bear. The second chapter of the First Book ends with a sentiment that goes deep indeed into the heart of national life: "Une nation doit se connaître elle-même. Sans cette connaissance, elle ne peut travailler avec succès à sa perfection." How few nations can answer to this test. Yet it is this self-knowledge that has kept the Jewish nation intact through two millennia of national misfortunes.

The sovereign represents the nation. "When . . . a people confer the sovereignty on any one person, they invest him with their understanding and will, and make over to him their obligations and rights, so far as relates to the administration of the State, and the exercise of public authority. The sovereign, or conductor of the State, thus becoming the depositary of the obligations and rights relative to government, in him is found the moral person, who, without absolutely ceasing to exist in the nation, acts thenceforwards only in him and by him." Such is the origin of the representative character attributed to the sovereign. He represents the nation in all the affairs in which he may happen to be engaged as sovereign. The Prince derives his authority from the nation; he possesses just so much of it as they have thought proper to entrust him with. He must respect and support the fundamental laws. "As soon as a Prince attacks the constitution of the State, he breaks the contract which bound the people

to him; the people become free by the act of the sovereign, and can no longer view him but as an usurper who would load them with oppression." Here Vattel adopts the views of Grotius, who had declared that "France, Spain herself, England, Sweden, Denmark, furnish instances of kings deposed by their people; so that there are at present few sovereigns in Europe whose right to the crown rests on any other foundation than the right which the people possesses of divesting their sovereign of his power when he makes an ill use of it."

It is very difficult, at any rate to the present writer, to follow in the light of history this class of reasoning. It is difficult to say more in the light of instances than that peoples always get rid of sovereigns that they (with good or bad reason) dislike if they have an organisation capable of securing this result. If the sovereign is an able man he usually retains his seat. And conversely, if a man is sufficiently able he will attain the sovereign power in fact, if not in name in the community to which he belongs. Vattel's theory of the origin of representative kingship leaves out of account men like Cæsar, Cromwell, and Napoleon. And the doctrine of representation is scarcely more real when it is applied to Parliamentary Government, though of course the swing of the pendulum to some extent secures to every man in the course of a long life some rough representation of his political notions. What in fact happens is that sovereignty tends to accommodate itself to a line of government that encounters the least resistance in the bulk of the people and secures the most stable equilibrium in the State. In practice rights and representation have little meaning. In England a Government could be in power for years after having been elected by a minority of the persons who actually voted.

However, sovereignty is and must be a fact however it is attained and retained. We approach a more practical matter when Vattel proceeds to discuss the business of a sovereign. It is his (or their) business to procure for the land a happy plenty of necessities. For this there must be a sufficient number of workmen. Emigration should therefore be forbidden.[1] "L'état doit encourager le travail, animer l'industrie, exciter les talents, proposer des récompenses, des honneurs, des priviléges, faire en sorte que chacun trouve à vivre de son travail." The sovereign ought to neglect no means of rendering the land under his jurisdiction as well cultivated as possible. The labours of agriculture should be held in honour. Who "osent mépriser une profession qui trouvait la genre-humaine, la vocation naturelle de l'homme?" Vattel even advocates the establishment of granaries as an excellent regulation for preventing scarcity, as an automatic regulation of prices. From agriculture he turns to commerce, by which—

Les particuliers et les Nations peuvent se procurer les choses dont ils ont

[1] It may be noticed here that this view has been from time to time favoured by the English Courts, which have never repudiated the argument that emigration is against public policy.

besoin et qu'ils ne trouvent pas chez eux. . . . Le commerce intérieur est d'une grande utilité; il fournit à tous les citoyens le moyen de se procurer les choses dont ils ont besoin, le nécessaire, l'utile et l'agréable; il fait circuler l'argent, excite l'industrie, anime le travail, et, donnant la subsistence à un très-grand nombre de sujets, il contribue à rendre le pays plus peuplé et l'État plus puissant.

Foreign trade has two additional advantages: it gives a country things she cannot herself produce and it may augment the wealth of a nation, and Vattel adds with respect to England, "Aujourd'hui c'est principalement le commerce qui met en sa main la balance de l'Europe."

The laws of nature with respect to commerce are based on the duty to assist and make others perfect. Every one has an imperfect right to purchase what he wants at a reasonable price from those who do not need the goods in question. But there is no such right to compel persons to buy, since every one is at liberty to buy or not to buy. This clumsy analysis is an early statement of the law of supply and demand, obscured of course by the curious doctrine of imperfect obligation by which Vattel attempted to clarify his juridical ideas. Every one is willing to sell what he does not want to keep, and is unwilling to sell what he does want to keep; while every one is willing to buy what he needs and is unwilling to buy what he does not need. That is really Vattel's position, and it is clearly a statement of the law of supply and demand. But Vattel goes on to justify the then current doctrine of protection on the ground that there is no duty to buy, though there may be to sell: "Tout état, par conséquent, est en droit de défendre l'entrée des marchandises étrangères; et les peuples que cette défense intéresse n'ont aucun droit de s'en plaindre, pas même comme si on leur eût refusé un office d'humanité." We may seriously doubt if Vattel's premises will stand the strain of this argument. His earlier argument of equal and reciprocal rights and duties seems inconsistent with a policy that tends to shut a nation out from its family obligations. However, the jurist feels no doubt on the subject:

Comme donc il appartient à chaque nation de voir si elle veut exercer le commerce avec une autre, ou si elle ne le veut pas, et à quelles conditions elle le veut, si une Nation a souffert pendant quelques temps qu'une autre vînt commercer dans son pays, elle demeure libre d'interdire quand il lui plaira ce commerce, de le restreindre, de l'assujettir à certaines règles, et le peuple qui l'exerçait ne peut se plaindre qu'on lui fasse une injustice.

This no doubt is an excellent statement of the condition of things with which Vattel the diplomatist had to deal, but to derive or attempt to derive such a condition from the laws of nature as they obtain among moral beings seems more interesting than convincing. Few persons can doubt that protection is an interference, possibly a heaven-sent interference, with the laws of nature, with the law of supply and demand. However, Vattel was desirous of discussing commercial treaties, and it was perhaps natural to justify their existence. As soon as a Government has provided

for national necessities and ensured plenty, the second purpose of its being, that of procuring the true happiness of the nation, comes into sight. To secure national happiness the sovereign must instruct and enlighten the people. The education of youth is one of the most important matters for the attention of the Government. Vattel's foresight in this question is very remarkable. He foresaw, indeed, in his shrewd, kindly way the whole social struggle of the nineteenth century. He was not to be blinded by the talk of the sacredness of preserving intact the sense of parental duty. If parents are unable by their circumstances to fulfil their duties, the State must intervene in the interest of the State. "Il ne doit point s'en reposer entièrement sur les pères." But the Government ought not to stop at the education of the individual. It ought directly to encourage arts and sciences and freedom of philosophical discussion. It ought to make every effort to inspire the people with the love of virtue and the abhorrence of vice by direct example, by the distribution of favours, by the banishment of whatever is corrupt. Moreover it should inspire the people with patriotism. State railways even are foreshadowed by the statement that the maintenance of highways and canals is the business of the sovereign power. Vattel carries his socialism, as some people would call it, even into the realm of Religion: "Une Nation doit donc être pieuse." Religion, in so far as it is an external matter, is an affair of the State. He would, of course, constrain no one in the matter of religion. Liberty of conscience, he tells us, is a natural and inviolable right. But a citizen must not *openly* do what he pleases without regard to the consequences that this may produce in society. It belongs to the nation at large to determine what religion she would follow and what public worship she thinks proper to establish. If necessary she can establish more than one religion; but if a particular sect is too small to demand a separate establishment, the dissenters may depart. There should, however, be "a universal toleration of all religions which contain no tenets that are dangerous either to morality or the State." The religion of the Prince himself does not matter so long as he carries out the behest of the community. Did not Joan of Hochberg remain ruler of Neufchâtel after that principality adopted the Protestant faith; and did she not, though still a Catholic, sign and sanction the ecclesiastical laws and constitutions? Here we have State control indeed; a State with rulers who are mere conduit-pipes of the popular will. Vattel is determined that the State shall be absolute master in its own house. He will have no Papal interference; no appeals to Rome; nothing that can limit in any fashion whatever the perfect freedom of the community. He amply justifies his position with elaborate instances.

Vattel turns from Religion to Justice, which he defines as the force which supports the laws with vigour and justly applies them to every case that presents itself. He carries justice farther than the Courts. He insists on the uses of distributive justice—the treatment in society of every one according

to his deserts. This principle ought to regulate the distribution of public employment and public rewards. His discussion of the right of punishment is full of interest. It is founded on the right of personal safety, the right to provide for security against any and every attack. When men unite in a society or nation, that society is charged with the duty of providing for the safety of its members. In this way the right of private war is merged in this public duty of protection. The nation, being a moral person, has also a right to provide for its own safety by punishing those who trespass against its laws. Thence arose both civil and criminal jurisdiction; the avenging both of private and public offences. The right of public war also exists, for the nation must protect itself against other nations as well as against individuals.

This leads us to the Third Object of Government, the duty to fortify the nation against external attacks. The strength of a nation consists in the number of its citizens, their military capacity and their riches. It is the business of a Government to increase these three sources of strength, always remembering that "la puissance d'une nation est relative; on doit la mesurer sur celle de ses voisins, ou de tous les peuples dont elle peut avoir quelque chose à craindre."

The principle that lies behind all modern discussions of what is known as the two-power standard of naval strength has not often been stated with such lucidity. The remaining propositions of the book hardly call for notice here, though much might be written on the right of separation from a nation, on the doctrine of effective occupation, and on the right of Eminent Domain, the right on the part of the State in case of necessity to all the wealth within the State. This doctrine is of course a natural corollary of the duty of self-protection, but it is also a convenient instrument in the hands of a doctrinaire socialist or a Finance Minister.

I do not propose to do more than touch upon that portion of Vattel's great work which is restricted to what we call to-day International Law. The field in one sense is too vast, in another too restricted. I have indicated at some length the general principles that inspire Vattel's treatment of international relationships, and that is sufficient for my general purpose since I was chiefly anxious to consider this author as a jurist without reference to any special branch of law. But some additional reference must be made to his first principles as set forth in his Second Book, which treats "of a nation considered in its relation to others."

Whatever duties each man owes to other men, the same does each nation in its way owe to other nations. Therefore one State owes to another State whatever it owes to itself, so far as that other stands in real need of its assistance, and the former can grant it without neglecting the duties that it owes to itself: "Telle est la loi éternelle et immuable de la Nature." Thus, he points out, the calamities of Portugal arising from the Lisbon earthquake gave England an opportunity of fulfilling the duties of humanity

with that noble generosity which characterises a great nation. But one nation must not force its good offices on another. Grotius asserted the general right to punish infamous behaviour by other nations, but Vattel denies this unless the behaviour directly affects the nation desiring to intervene. And again, you have no right to compel another nation to help you. But the law of love applies. It is the duty of nations to love one another. In all this there is much that is interesting. The earthquake at Messina and the misconduct of the Government responsible for the Congo horrors, make Vattel's remarks as modern as may be.

Again he asserts the general obligation of nations to trade with each other and he advocates the utmost freedom of trade, though he adds, with his usual caution, that each nation must decide if the commerce in question is likely to be useful to it. He then lays down the rule that every nation is entitled to security, namely to preserve herself from all injury and to prevent all intervention or interference in her private affairs. He is careful, however, to point out that the occupation of a nation does not exclude absolutely all rights of other nations in the territory. Every one retains the right to obtain, if necessary, not only food and ships and other goods at a fair price, but also the right of intermarriage in order to secure the continuity of the nation. Women for this purpose, he adds, may be carried off. It is in this book that the subject of treaties, on which Vattel was the greatest living exponent in his age, is treated at length. It is not possible to deal with his special branch of law here, but Vattel's treatment of it is not likely to be forgotten. His advocacy of Arbitration is likewise of very real importance, and may be of more value in the future than during the last century and a half.

The Third Book deals with War, which Vattel defines as "cet état dans lequel on poursuit son droit par la force." Public war is carried on between nations; private war between individuals. Private war comes within the law of nature. Nature gives men a right to employ force when it is necessary for their defence, and for the preservation of their rights. But as we have seen, society takes upon itself this duty and so has, for the time being, extinguished the right of private war. Thus the sovereign power alone has the right to make war. For this purpose he has the right to raise troops, and every citizen is bound to serve and defend the State so far as he is capable. No person is naturally exempt from taking up arms in defence of the State. But war must be just. The right of making war belongs to nations only as a remedy against injustice. Here once more Vattel gives us the ideal for the real. He knew well enough that wars on behalf of right and justice have been rare enough. He tells us of no remedy against unjust war. The only remedy is that great Republic of which Wolff dreamed and which to-day is again in the minds of men. But so insistent is Vattel on the necessity of maintaining peace that he insists on the necessity of a formal declaration of war—a *Res Pœnitentiæ*, so to speak.

It is noticeable that this jurist gives us no lengthy discussion of the vexed problems of neutrality. His definition of contraband is, however, of real value: "les choses qui sont d'un usage particulier pour la guerre, et dont on empêche le transport chez l'ennemi, s'appellent marchandises de contrebande." He goes on to deal with the rights of nations in war forbidding assassination and the use of poison; with faith between enemies, acquisition by war, the right of postliminium, the rights of private persons in war; and lastly, convention in war.

The Fourth and last book deals with the Restoration of Peace and Embassies. The question of the asylum offered by an ambassador's house is discussed with care.

Le Droit des Gens is certainly a work of the first magnitude. It modernised the whole theory and business of International Law, brought it out of the study into the field, the mart, the council chamber, and the palace. The law of nations was no longer a mystery. One of its most brilliant practical exponents became its populariser. He did, indeed, much for nations, for he imposed upon them theories of moral rational development up to which it became, in a sense, necessary for them to live. I have ventured here and there in this paper to criticise Vattel's premises, methods, and conclusions, and even to say that the ideals which he placed before the nations of the world, high though they are, might possibly have been higher. Certainly it appears to me that Wolff was by far the greater thinker of the two, and no doubt Vattel himself would have admitted this. But, on the other hand, Vattel was a practical man, and he brought Wolff's doctrines, with certain modifications, into the domain of practical life. To have done this was in itself an achievement that will immortalise his name. But Vattel was far more than a practical man. He was a thinker of great distinction and of great honesty, and he possessed what few thinkers of that age possessed, a profound religious faith. If he has no other lesson for our age he has this: that the limits of human speculation are narrow while the range of faith is infinite, and that man may choose the range of faith with perfect reasonableness for the purpose of determining his conduct. The logical structure of human society stands within a larger and nobler house. But Vattel had, as we know, much else to teach, and the amity of nations to-day owes many things to the Diplomatist of Neufchâtel.

SOUTH AFRICAN UNION.

[*Contributed by* A. Berriedale Keith, Esq.]

At the beginning of February 1909 the National Convention, which had sat at Durban and at Capetown, concluded its labours and laid before the public of South Africa in the form of a Bill the scheme which the members of the Convention had agreed on for the Union of South Africa, to be constituted in the first instance from among the four Colonies of the Cape of Good Hope, Natal, the Transvaal, and the Orange River Colony, or from any two or more which would consent to join. The draft Act was then laid formally before the four colonial Parliaments, and amendments to the draft were discussed in each, of which some were carried in the Cape and Natal, but not in the Transvaal. In the case of Natal the Government in accepting the Act declared that it must be submitted to a referendum before the Colony accepted union. In the other two Colonies the draft was accepted subject to certain amendments. The National Convention reassembled in May and discussed the draft with the amendments proposed by the Parliaments of the Cape and Natal, and the result was that the draft was reaffirmed with certain alterations and signed by the delegates of all the Colonies as altered on May 11. It was then submitted to the judgments of the several Parliaments and to a referendum in the case of Natal. Delegates were appointed by the Parliaments after approving the revised draft to proceed to England, and to secure the passing of the Bill into law as an Act of the Imperial Parliament, and the Bill was introduced accordingly in the House of Lords in the month of July, after its passage without substantial alteration and subject only to drafting amendments had been foreshadowed by the Under-Secretary of State for the Colonies.

As the terms of the Bill have now been passed into law, it is worth while examining in some detail the provisions of the latest attempt at constitution-making in the Empire. It must be said at once that perhaps too much has been claimed for both the originality and the excellence of the draft. The Constitution [1] is as a matter of fact indebted very greatly to previous Constitutions, and in a few cases has perhaps followed its models with excessive fidelity. None the less it is certainly an excellent piece of work both as regards drafting and contents.

The appearance of the Union Constitution is a striking example of the

[1] Printed as Parliamentary Paper [Cd. 4525], and, revised, as H.L. No. 113 of 1909.

rapidity with which a political movement may under favouring circumstances come to a head. Federation is indeed old in South Africa, and the Orange Free State desired in 1858 a political federation, which the Home Government were not prepared to approve in view of their anxiety to limit their responsibilities in the north. Later on views changed, and an effort was made by the passing of an Imperial Act in 1877 to provide for the union of the Colonies in South Africa and even for the inclusion of the republics within the union. But the attempt to exert pressure from above was ill-timed, and the Cape Government were suspicious of the scheme, so that the plan came to nothing, while the events of the next few years in the annexation and disannexation of the Transvaal rendered federation almost out of the question. It was not until after the Boer War that the ideal once more came within the range of practical politics, and the impulse to union was strengthened by the existence of union in the Commonwealth. But until the grant of responsible government to the Transvaal in 1906 and to the Orange River Colony in 1907 further progress was impossible, though under Crown Colony administration some efforts towards the end in view were made by the creation of a common railway administration for the two Colonies of the Transvaal and the Orange River in the shape of the Intercolonial Council, which dealt also with questions of expenditure in connection with the South African Constabulary, a force common to both Colonies. A more important matter was the voluntary union of the four Colonies and of Rhodesia, together with the territories under the administration of the High Commissioner for South Africa, in a customs union which was concluded in 1903, and renewed in 1906. In connection with this union the statistical service of South Africa was unified and located in a head office at Capetown. The grant of responsible government to the Transvaal and Orange River Colony seemed for a moment to throw things back: the Intercolonial Council was not a popular institution, and the South African Constabulary was deemed too dear; as a result the Council was dissolved, the joint liabilities were divided between the two Colonies,[1] and the South African Constabulary ceased under that name to exist and was replaced by local police forces under colonial control. For the railways, however, a new board of management was constituted with five members, two from the Orange River Colony and three from the Transvaal, which manages the railway system of the two Colonies. It was felt that any attempt at separate management was out of place.

The establishment of responsible government was almost at once followed by the rise of an effective demand for a federal government. One sign of this feeling was the discussion of a Federal High Court for South Africa as a Court of Appeal, to some extent in place of the Privy Council, which took place first in South Africa in 1905, and then at the Colonial Conference of 1907, even before the actual issue of the new Letters Patent granting responsible government to the new Colonies. The causes for the rise of

[1] Cf. *The Government of South Africa*, ii. 4.

this feeling were various. One important consideration was the railway question: the Cape and Natal were ever at variance with the Transvaal as to the share of traffic from the Rand to the sea. There are three great routes available, *via* Delagoa Bay, *via* Natal, and *via* the three Cape ports of Port Elizabeth, East London, and Capetown itself. The prosperity of the railways in each Colony practically depended on their success[1] in securing a considerable proportion of the through traffic, and the Transvaal was thus in a preponderating position. Its hands, however, were tied by the fact that in 1901, in order to secure the continuance of a supply of native labour for its greatest industry, the Transvaal made an agreement with the Portuguese Government under which the old proportion of traffic as between the Portuguese and British routes was to be maintained through the medium of railway rates. This question, bitterly disputed, was the main source of the conviction that there must be some form of federal action to solve the difficulties of the position, and its effect was increased by the serious financial depression which lies on South Africa as an aftermath of the war. The Transvaal alone is in a really prosperous position, with an industry every year more productive and an abundant supply of native labour for the time being, while the Cape is financially in a grave position of embarrassment leading to wholesale retrenchments and hardship. Natal again has had to face a serious native rebellion and a threat of renewed trouble, with the result that the colonial finances are seriously embarrassed.

In these circumstances the natural sentiment for federation, which was strengthened by the proceedings of the Conference of 1907, when the strength of the Commonwealth and the Dominion of Canada was contrasted with the multiple representation of the small white population in South Africa, grew steadily. The report of the Native Affairs Commission[2] of 1903-5, which insisted on the need of treating native affairs from the point of view of South Africa as a whole, was reinforced by the condemnation of the actual administration in Natal by the colonial Native Affairs Commission of 1906-7.[3] The High Commissioner, Lord Selborne, at the instance of the Cape Government, felt that a useful purpose could be served by the publication of a memorandum on the whole matter and issued a paper in which the various points on which unity of action is desirable were set forth clearly and in detail.[4] The result of the publication was to focus public attention on the question, and after much discussion at the Conference of May 1908 for the revision of customs and railway rates, the idea took practical shape in the selection of delegates from the several Colonies with the authority of the

[1] Cf. *The Government of South Africa*, i. 212 *seq.*

[2] Parliamentary Paper [Cd. 2399].

[3] *Ibid.* [Cd. 3889].

[4] *Ibid.* [Cd. 3564]. Cf. also the proposals of 1907 for common military action, and various proposals for agricultural co-operation, detailed in *The Government of South Africa*, i. 101, ii. 148.

colonial Governments and Parliaments to discuss the basis of a unification in some way of South Africa.

The actual draft Constitution which has resulted from the labours of the delegates is not, as was originally expected by the advocates of some union, a federal one, but an Act of Union. The preamble expressly says that it is desirable that the Colonies in South Africa should be united under one Government in a legislative union under the Crown of Great Britain and Ireland, and that it is expedient to make provision for the union of the Colonies and to define the executive, legislative, and judicial powers of the Government of the Union. In this respect the Government stands in striking contrast to the Government which would have been set up under the Constitution of 1877.

The Federal Constitution of 1877.—The Constitution which was proposed in 1877 [1] was a purely federal one, though the term "union" was used in the title and in the preamble. The provisions of the Act were mainly based on those of the British North America Act, 1867: for example, in the Executive Government the Governor-General was to be advised by a "Privy Council." The legislative power was vested in a Union Parliament consisting of a Legislative Council, to be constituted as the Crown should direct, and an elective House of Assembly in which due provision was to be made for the representation of the natives. Provision was made for the decennial re-adjustment of representation in the Parliament and for proportionate representation of the provinces. The provisions as to Royal assent to Bills, reservation, and disallowance were precisely modelled on those of the Canadian Act. The Union was to be divided into Provinces which were to have Councils or Parliaments, the details of the Constitutions being left to the Crown to decide. The Act, however, provided, on the model of the British North America Act, by ss. 33 and 34 for the exercise of powers by the Union and Provincial Parliaments respectively. The classes of subjects given to the two Legislatures were almost exactly the same as those laid down in ss. 91 and 92 of the British North America Act. The Provincial Councils had, therefore, exclusive powers in all merely local or private matters. The power of disallowance of such laws was vested, as in Canada, in the Governor-General. The distribution of legislative powers was not absolutely determined by the Act, because by s. 37 power was given to vary by Order in Council the distribution of powers laid down in ss. 33 and 34. Power was given to the Union to organise a Supreme Court of Judicature and a general Court of Appeal; but it was expressly provided that no Act of the Union Parliament should be sufficient to abridge the power of the Crown to grant special leave to appeal to the Crown in Council. The Parliament and Government of the Union were given, by s. 54, the same powers as were given to the Government and

[1] 40 & 41 Vict. c. 47. The arguments against federation in South Africa are set out at length in *The Government of South Africa*, i. 260 *seq.*, 303 *seq.*, 357 *seq.*

Parliament of the Dominion by s. 132 of the British North America Act with regard to treaties. All laws respecting natives or native affairs or immigration, and all laws passed by the Provincial Councils relating to the tenure of land, were required to be reserved unless owing to some urgent emergency, when the law could be assented to, but had to be sent home at once. The Constitution could be altered by Act of the Union Parliament, but such a bill required to be reserved under s. 56 of the Act. Power was taken for the admission of new members into the Union by Order in Council on addresses from the Union Parliament and the Legislature of the territory to be admitted. On admission, the territory admitted was to be entitled to proportionate representation in the Legislative Council and the House of Assembly.

The most significant parts of the Bill from the constitutional point of view were perhaps the assertion in s. 11 that powers vested in the Governor-General[1] were to be exercised by him acting on his own discretion and without the advice of the Privy Council;[2] and the provision in s. 19 for the due representation of the natives in the Union Parliament and in the Provincial Councils in such manner as should be deemed by Her Majesty to be without danger to the stability of the Government.

Effect could only be given to the Act up to August 1, 1882, and as circumstances prevented anything being done at that date, the Act lapsed.

Formation of the Union.—Under the Act the King is empowered by Proclamation at any time within a year from the passing of the Act to declare that the four Colonies of the Cape, Natal, the Transvaal, and the Orange River Colony shall be united as a Legislative Union with the name South Africa. The King may then appoint a Governor-General and the Union shall come into force at the date given in the Proclamation, but which must not be more than a year after the passing of the Act. The Colonies joining the Union at the start become original Provinces with the same boundaries as at present, the Orange River Colony being styled the Orange Free State Province, and any Colony which does not join can only enter later on by virtue of an Order in Council made under the powers taken in the Act for the entry of new Provinces (such as Rhodesia).

It will be seen at once that the assent of the Colonies concerned

[1] *Per contra*, the Tasmanian Interpretation Act, 1906, s. 12, provides that the term "Governor" means Governor acting with the advice of the Executive Council, a curious and unusual provision, which renders necessary a new definition in the Act No. 10 of 1908, s. 2, respecting indeterminate sentences, where the duty is cast on the Governor personally.

[2] This seems to go too far. For example, by s. 20 the Governor-General was empowered to summon the House of Assembly: that he should not be advised by the Council as to this would have been absurd. The real point is not "without advice," but the existence of power to disregard advice; such a power the Governor-General must have, or the government would be completely transferred to Ministers, a principle not yet accepted in regard to the Colonies and perhaps hardly compatible with the status of a Colony, though it was the view of Chief Justice Higginbotham of Victoria.

is assumed as given: the preamble merely recites the approval of their existing Parliaments, without reference to the people at all. In the case of the Commonwealth of Australia, in every instance not merely did the Parliaments assent, but referendums took place, so that the electors were fully responsible for the decision to accept federation. In the case of Canada, the electors were not in all cases consulted, inasmuch as the Governments of Canada and Nova Scotia on their own responsibility accepted confederation. For that error the Nova Scotia Government were turned out of office at the next general election, and Nova Scotia returned to the Federal Parliament members pledged to agitate for the undoing of the Union so far as it concerned Nova Scotia. Eventually it was found possible, through the influence of the Imperial Government, and by the exercise of tact on the part of the Federal Government, to arrive at a compromise, under which the Federal Parliament undertook to pay Nova Scotia a larger sum than it originally had contemplated as a contribution towards the provincial finances, and the Province acquiesced in the new arrangement and Mr. Howe entered the Dominion Parliament.

It must be confessed that the precedents are in favour of a fuller consultation of the electors than has been in the case required.[1] It must be admitted, moreover, that the Parliaments now existing were not elected with a view to union or federation, and that it is somewhat contrary to principle that Parliaments elected merely for the ordinary conduct of public affairs should accept an arrangement which sanctions the abolition of their separate existence.[2] No question of their legal competence of course arose, if for no other reason because the Act to be passed was not to be passed by them at all, but by the Imperial Parliament, which is entitled to do what it thinks fit in the matter. The real justification for being ready to do without a referendum was no doubt the fact that there was no substantial dissatisfaction, at any rate in three of the Colonies, while the referendum in the fourth as a matter of fact did not alter the state of affairs as far as regards it, and the Parliament was clearly shown to be in sympathy with the popular feeling on the question. The preamble ignores the referendum in Natal, mainly no doubt in the interests of simplicity.

To turn now to the actual provisions of the Constitution of the Provinces when united, I propose to compare their terms with those of the Constitutions of Canada and the Commonwealth, from which many of the Union clauses have been borrowed. It will be convenient to follow in the main the order of the Act and to deal first with the Executive Government

[1] In Natal arrangements were made to hold a referendum. Cf. the criticisms in *The Empire Review*, xviii. 114 *seq.*, where it is pointed out that the Senate will represent the existing colonial Governments and cannot be changed for ten years, while the nominee Senators will represent the first Government for ten years also.

[2] Colonial Parliaments are of course not in any way bound by law to consult the constituencies on important measures: for example, in 1907 the Commonwealth Parliament increased members' salaries in the face of a good deal of adverse feeling in the country.

of the Union, then with Parliament, next with the Provincial executives and legislatures. Some notice of the Judiciary and the Civil Service may follow, and then the rules as to language, finance, treaties, and naturalisation, while the question of the admission of new provinces and territories and the alteration of the Constitution will conclude the discussion.

I. The Executive Government of the Union.

The Governor-General.—The provisions of the Constitution as to the Executive Government[1] of the Union are very closely modelled on those of the Australian Constitution. The Executive Government is declared by s. 8 to be vested in the King, and is to be exercised by the Sovereign in person or by a Governor-General as his representative. The provision for the personal exercise of the power is new: it does not occur in the Australian or Canadian Constitutions, though it is not excluded by either, but a curious problem arises as to the exact position of His Majesty if he did as a matter of fact visit either Canada or Australia. It is clear from the Constitutions of either country that the Governor-General would continue to exercise all his functions, and the somewhat curious position would arise that the Sovereign had no exact constitutional position in one of his own dominions. For example, any Bill passed by the Parliament during his stay would have, under the Constitution Acts in either case, to be presented to the Governor-General for his assent, unless indeed the Governor-General were to appoint His Majesty his deputy for the purpose! This anomalous position would not necessarily exist in the case of South Africa, since the Sovereign could actually administer the Government in person: yet by s. 12 the Executive Council is to advise only the Governor-General, and nothing is said of advising the King in person, a curious omission of doubtful signification.

The appointment of the Governor-General is, of course, vested by s. 9 of the Constitution in the King: the appointment is to be during pleasure and he may exercise within the Union such powers and functions as the King may be pleased to assign to him. The salary of the Governor-General is fixed at £10,000 a year and is not to be diminished during his tenure of office: it was originally proposed that if any person other than the Governor-General was appointed to administer the Government, he should not be entitled to receive from the Union any salary in respect of any other office during the period of his administration, but in the final form of the Bill this proviso was dropped.

In view of the power of the Crown to limit the delegation of authority, the office of Governor-General will of course[2] be created by Letters Patent

[1] Ss. 8-17.

[2] Mr. Garran, *The Government of South Africa*, i. 375, maintains the contrary opinion as regards Australia.

under the Great Seal, and will delegate to the Governor-General the ordinary executive power of the Crown, including special mention of the prerogative of mercy. On the other hand, there will be no delegation of such prerogatives as that of conferring honorary distinctions. Provision must also be made for the succession to the Government in the case of the absence or incapacity of the Governor-General, and presumably either the officer in supreme command in South Africa or the Chief Justice would be named to act as Governor-General. The prohibition originally intended of the payment of salary from Union funds would not of course have affected him, as his salary is Imperial, while the Chief Justice of South Africa could hardly have been expected to administer without additional remuneration if he continued to perform the work of his own office, and for this reason no doubt the clause was amended to omit the prohibition. It may be noted that under the wording of the Constitution it would appear doubtful whether the Governor-General on leave of absence could receive under any conditions half-pay, as it appears to be contemplated that the officer acting as Governor-General shall receive the full salary. Moreover, no power to appoint deputies was expressly given in the Constitution as drafted. The omission was somewhat striking in view of the inclusion of such a power in the Constitutions of Australia and Canada, and the power to appoint deputies must therefore have been regarded as somewhat doubtful, though it might no doubt have been exercised as it is in the other Dominions and States under the Letters Patent. This omission, however, is made good in s. 11 of the Act. It is also significant that the power of the Governor-General is expressly confined in s. 9 of the Act to the limits of South Africa, and that accordingly it will not be possible for him to perform authoritative acts when he is not within the actual territories of the Government, though the contrary is implied in s. 11. This is a salutary rule, as the practice of allowing Governors to perform official acts while beyond the territorial limits of their Colonies is of doubtful propriety and legality.

The salary fixed is the same as in Canada and Australia: its value will doubtless be considerably increased by allowances, and there is little probability of any attempt to diminish the amount, as was the case in Canada shortly after federation, when the importance of the viceregal position was hardly realised in the Dominion, and when Canadian thrift was shocked at the idea of one man spending so much.

The Executive Council.—Of course in the actual conduct of the administration the Governor-General will act on the advice of his Executive Council. Generally speaking, the Constitution transfers to the Governor-General or the Governor-General in Council respectively all powers, authorities, and functions which at the time of the establishment of the Union are vested in the Governors or Governors in Council of the Colonies. There is, however, one significant exception: by s. 147 the control and

administration of native affairs and of matters affecting specially or differentially Asiatics throughout the Union shall vest in the Governor-General in Council, who shall likewise exercise all special powers in regard to native administration hitherto vested in the Governors of the Colonies or exercised by them as supreme chiefs and shall control all native reserves, which if previously inalienable save by Act of a Colonial Parliament shall remain inalienable save under an Act of the Union Parliament. The insertion of this clause is no doubt intended to do away with the previous rule, under which in native affairs the Governor of Natal was especially bound by the Royal Instructions of 1893 to act on his personal discretion after consultation with Ministers, while a similar rule is clearly implied in the provisions of the Constitutions of the Transvaal[1] and Orange River Colony.[2]

The fact that a power is assigned to a Governor or to a Governor in Council is not a distinction of much importance. By the Royal Instructions issued to the Governor, he is told to consult his Ministers, and constitutional practice renders their advice equally necessary in the cases where legally he must act in Council and in those where he can legally act without ministerial advice. There is, in fact, no act which a Governor should do without advice, if his ministers are willing to advise, and the only matter of importance is to decide when to accept and when to reject that advice. In considering this question the Governor can receive in the great majority of cases no help from the mere legal fact of an Order in Council being required or not. Nor again, must it be remembered, is the legal difficulty absolutely fatal: it is true that s. 13 of the Constitution requires that if the Governor-General in Council is empowered to do something he must act with the advice of his Council—a phrase borrowed from the Australian Constitution and no doubt synonymous with the requirement of the Canadian Constitution, "by and with the advice"—but the Executive Council remains in the last resort in the Governor-General's control: for in the first place he can always dismiss the existing members, and he can in the second place fill it up for the moment in any way he pleases.

It might have been expected that in this regard the new Constitution would have endeavoured to go beyond the Australian precedent just as that Constitution went far beyond the precedent of Canada, but this is not the case. The British North America Act, 1867,[3] decides that there shall be an Executive Council, styled the Privy Council, for Canada, but it in no way defines the mode in which that Council is to be constituted. The Australian Constitution[4] not merely calls a Council into being, but it provides that the officers appointed by the Governor-General to administer the departments of State are to be the King's Ministers of State for the

[1] Letters Patent, December 6, 1906, s. 51.

[2] Letters Patent, June 5, 1907, s. 53. [3] S. 11.

[4] 63 & 64 Vict. c. 12, Sched. ss. 62, 64. Cf. Quick and Garran, *Const. of Commonwealth*, pp. 709-11.

Commonwealth and also members of the Federal Executive Council. It is important to note that they are not the only members of the Council; the number is unlimited and all hold office at pleasure. Precisely similar provisions occur in the case of the South African Constitution. There are to be not more than ten Ministers of State, who will also be Executive Councillors, but they will not constitute the Executive Council, which remains undefined in point of numbers. But while the Governor-General is thus still able to disregard as a mere matter of law Parliamentary considerations in the question of the appointment of his Council, an important restriction exists under both the Australian and the South African Constitutions on his choice of advisers: after the first general election no Minister [1] can hold office for more than three months unless he obtains a seat in either house of Parliament. The provision is not new in South Africa, as it appears in the Natal Constitution of 1893, by which, however, the time allowed for obtaining a seat is four months. The provision of the Constitution as it stands is borrowed from Australia, and it was also adopted in 1903 by Victoria. It is still left elsewhere to constitutional practice, and quite recently Ministers have held office in Canada, Newfoundland, Queensland, and Western Australia for considerable periods while without places in Parliament.

The rest of the officers of the Government are made subject to the control of the Executive Council by vesting their appointment by s. 15 in the Governor-General in Council, except where the appointment is delegated by the Governor-General in Council or other provision is made by law for the mode of appointment. The clause is a commonplace of colonial constitutions and is designed to distinguish Ministers who hold office at pleasure and are selected by the Governor-General directly from public servants whose tenure is in effect permanent as compared with that of Ministers, who are dependent on Parliament for their position.

It is, however, significant that there is no mention of the political conventions of the Constitution in the Act. Strictly speaking, there is no need even for the Ministers to do more if they desire to hold office permanently than to secure for themselves seats in Parliament, and they can be up to the number of eight nominee members of the Upper House. The Governor-General's instructions will make no mention of the convention by which he chooses Ministers who possess the confidence of Parliament, and he will do so merely in accordance with the established practice. It might have been expected that the Constitution would have gone further in this regard, but the old custom is convenient, and it is always possible that any attempt to define more closely the nature of the Executive Government might have led to difficult questions of law. The Constitution does not even define the quorum of the Executive Council, and no doubt that will be provided for in the Royal Instructions to the Governor-General.

[1] S. 14.

Military Command.—The control of the military and naval forces within the Union is vested in the King or in the Governor-General as his representative by s. 17. This provision is rather curious; the corresponding provision in the case of the Commonwealth refers to the naval and military forces of the Commonwealth, and while the provision of the British North America Act includes the land and naval militia and all naval and military forces of and in Canada, the command-in-chief in that case is vested only in the Crown,[1] and it is by the Letters Patent that the Governor-General is given the title commander-in-chief.[2] This title, which is held by practically every colonial Governor, is merely honorific and does not apply to the Imperial naval forces, but apparently in South Africa the command-in-chief will apply also to the Imperial naval forces while in South African waters. Of course it carries with it no actual power.

II. The Parliament of South Africa.

The Senate.—The Parliament[3] is to consist of the King, a Senate, and a House of Assembly. The Senate is to be composed in the first instance of eight nominated members selected by the Governor-General in Council, of whom four shall be selected on the ground of their thorough acquaintance by reason of official experience or otherwise with the reasonable wants and wishes of the coloured population of South Africa. In addition each Province shall elect eight members. These members will be chosen by the two houses of the colonial Parliament sitting together on the principle of proportional representation with the single transferable vote, on a date before the day appointed for the coming into effect of the Union. In both cases the Senators will hold office for ten years, and casual vacancies will be filled up by the Governor-General in Council in the case of nominated members, and in the other cases by the Provincial Councils on the principle of proportional representation with the single transferable vote; but those appointed by the Councils will only hold office until the expiration of the first ten years. Parliament may provide as to the manner in which after the expiration of ten years the Senators shall be elected, but if no special provision is made it will be carried out by the Provincial Councils sitting together with the members of the House of Assembly for the Province on the principle indicated above. A Senator must be thirty years of age, be qualified as a voter for the election of members of the House of Assembly in one of the Provinces, have resided for five years in the Union

[1] Otherwise in the Quebec Resolutions; see *The Framework of Union*, p. 27. See 30 Vict. c. 3, s. 15; 63 & 64 Vict. c. 12, Sched. s. 68.

[2] By a mere accident this was not done until 1903, when the omission was noticed.

[3] Ss. 19 *seq.*

as constituted at the time of his nomination or election, be a British subject of European descent, and if an elected member be possessed of immovable property within the Union of the clear value of £500 over and above any special mortgages thereon. The Senate shall elect a President, who may be removed from office by a vote of the Senate or who may resign by writing under his hand addressed to the Governor-General. The quorum is twelve, and the President or other presiding officer shall only have a casting vote.

It will be noticed that the Senate combines in a curious manner the principles of nomination and of election. There is no parallel for that in South Africa, where the upper houses of Natal, the Transvaal, and the Orange River Colony are nominee and that of the Cape elective. Nor has a combination of nomination and election yet been tried in the upper chamber of any of the other Colonies enjoying responsible government, though a proposal to remodel the Parliament of Canada on this basis was introduced into the Senate in 1909 by Mr. Scott, late Secretary of State in the Dominion Cabinet.[1] The motive of the rule is, however, sound—it is often desirable to secure the presence in the Parliament of some outstanding man who could not be expected to face or to be successful in an ordinary election, and for whom special provision should be made. The requirement that the half of the nominated members should be selected on account of their knowledge of native wishes, so far as they are reasonable, will not of course be capable of legal enforcement, and the Governor-General in Council will alone be qualified to decide what amount of acquaintance will satisfy this requirement, but no doubt it will ensure that there will always be on the Senate a small body of men who are thoroughly acquainted with the native problem; the others may probably be skilled lawyers. Again, the length of tenure of office on the part of the members is longer than is usual elsewhere where there are elective upper houses; the ordinary duration of such houses is six years, and the principle of a rotation of retirements ensures that the complexion of the house is always being changed more in the direction of bringing it into harmony with the views of the electorate. The nominated upper house of Natal sits for ten years. It should, however, be added that the power of dissolution applies under s. 20 to the Senate as well as to the lower house, though nominee members of the former body are not affected by dissolution. The property qualification is borrowed from the practice in the Cape, where however it is higher, being fixed at £2,000 immovable property or £4,000 movable property; in Natal it is £500 immovable property; in this respect the Constitution is not democratic,[2] as compared with that of Australia. The age limit is normal in all the Dominions, but is not the rule in the

[1] Cf. also the Imperial Act of 1854, which proposed to introduce the system into the Upper House of Canada.

[2] In *The Empire Review*, xviii. 118, the qualification is considered too low.

Commonwealth. The requirement of European descent[1] is unusual, but is derived from the state of affairs in the Transvaal and the Orange River Colony, and also substantially in Natal, where the native has neither the franchise nor the right to be elected a member to Parliament.

The House of Assembly.—The lower house[2] is to be composed of members directly chosen by the voters of the Union in electoral divisions defined by a commission selected from the judges of the several colonial Supreme and High Courts. Under the original draft each division was to return three or more members, unless for special reason in case of sparsely populated regions the number might be reduced by the commission. In defining the divisions the commission would be guided by the quota obtained by dividing the total number of voters in each province as settled at the last registration by the number of members of the Assembly to be elected in that Province, and would divide the districts so that the number of voters in each division should be a multiple of the quota, and the number of members to be elected should be equal to the multiple. At the Bloemfontein Conference the principle was adopted of single-member constituencies, and the divisions will contain as nearly as may be the quota. The commission can, however, pay attention to (*a*) community and diversity of interests, (*b*) means of communication, (*c*) physical features, (*d*) existing electoral boundaries, (*e*) sparsity or density of population, and may vary the quota to as much as 15 per cent. either way.

The number of members to be elected in the first case is fixed at fifty-one for the Cape, thirty-six for the Transvaal, and seventeen each for Natal and the Orange Free State Province. These numbers shall in no case be diminished unless the total number of members of the Assembly chosen for the four original Colonies reaches 150 or ten years have elapsed from the Union, whichever is later. Provision is made for the increase of the number of members on the result of the census of 1911 and of each quinquennial census thereafter. The quota of the Union will be fixed by dividing the total number of male European adults in the Union as ascertained by the census of 1904 and as specified in the Act itself by the total number of the members of the Assembly as constituted under the Act, and each Province will be entitled to an additional member or members if its population has increased since the census of 1904 by a number equal to the quota or a multiple thereof. No additional member shall, however, be allotted to any Province until the total number of European adults in such Province exceeds the quota of the Union multiplied by the number of members allotted to the Province for the time being, and thereupon additional members shall be allotted to such Province in respect only of such excess. As soon as the number of the Assembly reaches

[1] The needlessness of this exclusion is emphasised, *ibid.*; and see Mr. Schreiner's letter to *The Times*, July 27, 1909, p. 9.

[2] Ss. 32-50.

150 no further increase is to take place unless Parliament otherwise decides, and the distribution of members among the Provinces will then be made so far as possible uniformly proportionate to the number of European male adults in that Province. The allocation of any additional members to divisions and the redivision thereby rendered necessary will be carried out by a commission of three judges appointed by the Governor-General in Council. The redivision and allocations shall only take effect at the first general election after they have been made.

These elaborate provisions are based on those contained in the Constitutions of the Transvaal [1] and the Orange River Colony,[2] and are intended to avoid the evil seen in the Cape and in Natal, where representation has at times completely disagreed with the alteration in population. They will probably be effective for their purpose, though inevitably rather complicated.

Qualifications of Members.—The qualifications of members are that they must be qualified to be registered as voters [3] for the election of members of the lower house in an electoral division of the Union, have resided five years in South Africa, and be British subjects of European descent. Here again the colour bar is noteworthy and marks a retrogression from the point of view of the Cape practice. Provision is made that the voters at Assembly election shall be those qualified to vote in the existing Colonies for the election of members of the Assembly, while in matters of procedure, such as registration of voters, election petitions and so forth, the laws of each Colony are to apply in the elections in each new Province. There are, however, excluded from the franchise (as in the Transvaal and Orange River Colony) all soldiers on full pay, and further, while the date of the nomination of members is not, as originally proposed, to be the same throughout the Union, all polls are to be held on the same day, a provision which in a place of vast distances like South Africa will reduce to a minimum plural voting.

The Parliament may legislate for the qualifications of electors, but no such law shall disqualify any person who is, or may become, entitled under the laws of the Cape as existing at the time of the Union to be registered as a voter from being registered as a voter in the Cape by reason of race or colour alone, unless such law shall be passed by the two houses sitting together, and passed at the third reading by a two-thirds majority of the total members of the two houses. No person, however, who is registered as a voter in any Province at the date of the passing of such a law may be removed from the register because

[1] Letters Patent, December 6, 1906, s. 15 and Sched. iii.

[2] Letters Patent, June 5, 1907, s. 18 and Sched. iii.

[3] This excludes female members, and there is no female suffrage, which would be peculiarly out of place in a country like South Africa. Cf. *The Government of South Africa*, ii. 396 *seq.*

of a disqualification of race or colour alone. This provision [1] is intended to safeguard the rights of the native voters in the Cape; it is, however, somewhat doubtful if it is adequate for the purpose. The native vote has been, even in the Cape, subjected to serious criticism, and the South African Native Affairs Commission [2] in their report were inclined to prefer the expedient of the nomination of representatives of the coloured races rather than the direct participation of these races in the franchise. Of the four original Provinces only one recognises in fact a native franchise, and therefore there may be a strong movement in any new Parliament to couple the provision of some sort of representation for natives with the abolition of the native franchise in the Cape. It was therefore suggested in the Cape that the clause should be amended to require the assent of two-thirds of the Cape members for the passing of any law disqualifying natives in that Province for the franchise on colour or race grounds. On the other hand, it was argued that there was little chance of the passing of any disfranchising measure of this kind, and that the safeguard of a two-thirds majority of both houses should be adequate. The Bloemfontein Conference strengthened the position by in effect requiring any such bill to be reserved, and in introducing the Bill in the House of Lords, Lord Crewe indicated that such a Bill might be refused the royal assent.

Under the original draft the election of members of the Assembly was to take place on the principle of proportional representation with the single transferable vote, and the Governor-General in Council was to issue regulations as to the arrangements for counting the votes on this principle; on such regulations being promulgated they were to have the force of law unless and until Parliament otherwise provided; but at the Bloemfontein Conference this proposal was rejected as a compromise in order to obtain the retention of the principle of equal electoral areas. The scheme of proportional representation has not hitherto been tried in South Africa, nor is it yet common in the other Dominions. In the State of Tasmania [3] there exists an extremely complicated system of preferential voting on the Hare system, while in Western Australia [4] there is provision for preferential voting. At the elections of 1908 the system was tried in practice for the first time, but not with any conspicuous success, as the supporters of the Government in several cases forgot to record their preferences, with the result that the Government lost some hitherto safe seats. In New Zealand the second ballot was used at the general election of 1908: on the whole its use was unpopular in the Dominion. It is true that it prevented minority representation in several

[1] S. 35. [2] Parliamentary Paper [Cd. 2399], pp. 67 *seq.*

[3] Act No. 6 of 1907, and Douglas, *The Hare-Clark System of Election* (Hobart, 1908).

[4] Act No. 27 of 1907. In Queensland there is the contingent vote. In the Cape plumping for the upper house exists.

seats, but though there was no great abstention from the second ballot, the first ballot was not taken part in by many voters, and candidates and electors alike resented the trouble of a second canvass and a second poll. Moreover, there were instances in which the seat was lost to the Government or the Opposition as the outcome of the personal feeling engendered during the conflict by the supporters of two candidates of the same political complexion. In the strife their supporters were so exasperated that at the second ballot the friends of the man who lost on the first ballot transferred their votes to the candidate of the rival party, rather than allow the other candidate of their party to win the seat. It is doubtful if the system will survive the next Parliament: those who had to undergo the second ballot are believed to have induced the other members who were lucky enough to escape the ordeal to combine with them to repeal the Act. In the case of Western Australia it is understood that the Government may introduce legislation to make preferential voting compulsory instead of optional as at present, while Tasmania seems satisfied with the system in force. It is uncertain how it would have worked in South Africa; the country is accustomed to weak governments, and therefore would not have felt any special inconvenience from that result, if, as seemed most probable, the preferential system brought it about.

The Two Houses.—The Governor-General has the unusual power of dissolving both houses simultaneously or of dissolving the Assembly only:[1] he cannot, however, dissolve the Senate for ten years after the Union, and in no case is the dissolution to affect Senators nominated by the Governor-General in Council. There must be a session every year.[2] The Parliament will sit at Capetown (s. 23), though the capital of the Union for other purposes is Pretoria (s. 18), while the Supreme Court will sit normally at Bloemfontein.

The disqualifications for membership of the two houses are the same:[3] they follow the usual lines and include bankruptcy, insanity, conviction of treason or murder or any other crime punished by twelve months' imprisonment without the option of a fine, and the holding of an office of profit under the Crown within the Union. From this last disqualification are exempted persons who are Ministers of State in the Union, or are in receipt of pensions or of naval or military half or retired pay. This exemption saves Ministers from having to face re-election on the acceptance of office, a practice which is inconvenient and is gradually disappearing in the Dominions. Members of the Provincial Councils are also disqualified from holding seats as members of Parliament, and a member of one house cannot be a member of the other. Seats in either house are vacated on the occurrence of any of the disqualifications set forth above, and also if the member ceases to hold the proper qualifications or does not attend, unless with special leave, for a whole session of Parliament. Members of both

[1] S. 20. [2] S. 22. [3] S. 53.

houses are to receive salaries at the rate of £400 a year as against £300 a year in the original draft, less £3 (originally £2) for each day's absence—not an extravagant remuneration in view of the cost of living in South Africa. The privileges of Parliament are to be such as are declared by Parliament, and in the meantime those of the House of Assembly of the Cape. Both houses can make rules and orders for the conduct of their business, and until they do so the rules and orders at present in force in the Legislative Council and House of Assembly of the Cape shall apply to the Senate and the House of Assembly of the Union. In the case of joint sessions of the houses, which will be convened by the Governor-General by message, the Speaker of the Assembly shall preside, and the rules of the Assembly shall prevail. Ministers may speak in either house, but can only vote in that house in which they have seats (s. 52).[1]

The Powers of Parliament.—The Parliament is given plenary power of legislation for the Union,[2] subject to the requirement of the Royal Assent and the possibility of disallowance by the Crown. The Governor-General is to declare, according to his discretion, but subject to the provisions of the Act and also to the Royal Instructions, that he assents in the King's name, or that he withholds assent, or that he reserves a Bill for the signification of the King's pleasure. He may also return a Bill with amendments for the further consideration of the house in which it originated. The King may further disallow any Act within a year after the assent of the Governor-General, and such disallowance will, on being communicated to Parliament by speech or message or by proclamation, have effect as annulling the law. Similarly a reserved Bill must be assented to within a year of the time when it was presented to the Governor-General for the Royal Assent or it will have no effect. These rules differ in one or two points from the established practice. They follow the example of the Commonwealth in leaving to the Governor-General's discretion the question of reserving Bills, and in the original draft made no allusion to the possibility of instructions being given by the Crown to the Governor-General, a possibility expressly recognised in the British North America Act, 1867, and in the Australian States Constitution Act of 1907. Of course this did not really prevent the giving of instructions, as the Governor-General as an Imperial officer is subject to his Majesty's directions, or again the discretion he is to use is not, it may be said, his individual discretion, but his discretion as an Imperial officer, but to avoid doubt the Bloemfontein Conference inserted a reference to the Royal Instructions. In any case the power will doubtless be sparingly used and only on the gravest Imperial grounds. It may be remembered that only one Commonwealth Bill has been reserved since the inauguration of the Commonwealth: that was the British Preference Bill of 1906, which purported to give a preference to British

[1] So also in Victoria, Transvaal, Orange River Colony, Cape, and Natal.

[2] Ss. 59-67.

goods imported in British vessels manned exclusively by white labour, which was reserved on the advice of Ministers as it was deemed to be counter to treaty obligations, and which was by the consent of the Commonwealth Government allowed to lapse.

The restriction of the period of disallowance to one year is borrowed from the Australian precedent, and is in accord with the practice in the Canadian Provinces. It cannot be said to be altogether convenient, since if the Act was one which contained objectionable matter among satisfactory provisions the Imperial Government would be put in the difficult position of either disallowing a measure of value or of allowing it to stand good without amendment, whereas if two years were allowed the Act might be allowed to stand on the understanding that it should be amended in the next session of Parliament. This inconvenience has been felt by the Dominion Government in the case of Provincial Acts, and the only alternative procedure, that of allowing the Act to stand on the faith of a promise of amendment, is not a convenient one. Ministers in the Dominions cannot often control the Parliaments, and a failure to carry legislation is apt to give rise to charges tacit or explicit of bad faith and to lead to friction. Fortunately the probability of legislation seriously defective being passed by the Union Parliament is not sufficiently great to render the matter of much concern. Similarly the restriction of the time within which a reserved Bill may be assented to to one year, which is not precedented even in Australia, though it applies to the Canadian Provinces, is open to objection, indeed more serious objection than in the other case.

Money Bills.—The two houses, following universal colonial practice, are not put on the same level as regards Money Bills. No law which imposes taxation or appropriates revenue or moneys shall originate in the upper house, and the upper house may not amend any Bills so far as they impose taxation or appropriate revenue or moneys for the service of the State. Nor may the Senate amend any Bill so as to increase any proposed charges or burden on the people. But the provisions are safeguarded, as in the case of the Commonwealth of Australia, more satisfactorily than is usual in colonial constitutions, for a Bill is not to be taken to appropriate money or to impose taxation merely because it imposes fines or other pecuniary penalties or provides for their appropriation.[1] Further, the power to amend is only forbidden in so far as a Bill is what may popularly be styled a Money Bill: there is no doubt that the restriction is valuable, for a discussion has arisen in 1908 between the two houses of the Parliament of the Transvaal as to the power of the upper house to amend in any way the provisions—even non-financial—of a Bill which contains money clauses.[2] The strict wording of the Transvaal Constitution, which follows

[1] Cf. 63 & 64 Vict., c. 12, Sched. s. 53 (Commonwealth). So Victoria, No. 1864 of 1903. See also *The Framework of Union*, pp. 106 *seq.*

[2] Cf. *The Government of South Africa*, i. 405.

that of Natal, would seem to prohibit any amendment at all of such a Bill by the upper house; this would, however, be unreasonable, if legal, and the ordinary common-sense rule would appear to be that which is established clearly for the Union. Further, the lower house is, as in the Commonwealth, prevented from tacking by the provision that no Bill appropriating the revenues or moneys for the annual services of the Government shall deal with any other matter.

On the other hand there is no provision in the Bill similar to that of the Australian Constitution which forbids the mixing up of other matters in taxing bills, and requires that customs and excise taxation shall each be dealt with in separate Bills, while other taxation Bills must be confined each to a single subject. Again, there is no power given to the upper house, as is now given by law or practice in the elective upper houses of the Australian States and to the Commonwealth Senate, to suggest amendments to—or even to amend in certain cases—Money Bills, a power which has enabled the Commonwealth Senate to suggest increased burdens on the people which they could not do by direct amendment. The exclusion of the Senate from any power in these matters is no doubt paralleled in Canada and in the other Colonies or States, where there are non-elective upper houses, but it is decidedly unusual in the case of an elective upper chamber, more especially as the upper house of the Cape possesses by law the power of amendment and freely exercises it. The right of rejection still remains, and no doubt would be used—as even in Natal—in case of any save annual Appropriation Bills.

The rule also is formally laid down that all appropriations must be recommended by the Governor-General; this is a commonplace of every Dominion Constitution since 1840, and only in the Bahamas and Bermuda is some degree of freedom still preserved to the individual member by law to propose money votes, a right tending to financial chaos.[1] The rule, however, does not apply to appropriation of fines or pecuniary penalties.

Provision for Deadlocks.—In one respect the Constitution is somewhat more advanced than any other colonial Constitution. The provision in the case of deadlocks as originally drafted was of remarkable simplicity: if the Assembly passed a Bill and the Senate did not agree, or insisted on amendments to which the Assembly did not agree, the Governor-General might then convene a joint sitting of the houses at which the Bill with any amendments made by either house and disagreed to by the other house should be deliberated upon and voted for. Any amendments which the majority of members sitting together approved, and the Bill itself as amended, if so approved, should be taken as passed, and the Bill should then be presented to the Governor-General for his assent. The nearest parallel for this procedure, which required no delay, no election, no referendum, and no

[1] Cf. *The Government of South Africa*, i. 408.

dissolution, is to be found in the deadlock provisions of the Constitutions of the Transvaal and the Orange River Colony.[1] There, however, the procedure is much less simple: in the first place the Bill must be carried twice by the lower house, and that in successive sessions: then the Governor may either dissolve the houses, and after a general election and a repeated rejection of the Bill convene a joint session of the houses, or if he prefer, he may at once convene a joint session. The former procedure involves considerable delay and a general election: the latter permits of the whole matter being disposed of in the second session of Parliament. In the case of the Commonwealth,[2] from which the provisions in the Transvaal Constitution are borrowed with modifications, the procedure permits of the second passing of the Bill in question in the same session, but three months after the first rejection, and then the dissolution may take place, but it does not permit the simple holding of a joint session after the second rejection, and in this regard the Transvaal and Orange River Constitutions are more democratic. Perhaps this alteration was due to the fact that the upper house in these Colonies was not to be in the first instance elective, and therefore it was felt that it would be impossible to insist always on a penal dissolution of the lower house. The South African rule, as first drafted for discussion at the Natal Conference, was of remarkable simplicity: the whole thing could take place in one session, and there was no need for a second passing of the disputed Bill. The upper house was thus certainly placed in a somewhat weaker position than any other elective upper house in the Dominions, for as a rule any Bill passed by a substantial majority in the lower house would be able to secure the majority in the joint sitting requisite for the passing of the law. On reconsideration, however, a second session was required to take place before a joint sitting could be held.[3] On the other hand, the upper house should have power to amend laws in all questions of detail, and to exercise a revising power on legislation, and if it does this its real object will be fulfilled. Probably the inconvenience caused to the late Cape Government by the strong position of the upper house has induced the Conference to adopt this special form of legislation. The other upper houses in South Africa have, it may be noted, not played any great part in colonial politics, and therefore the representatives of the Transvaal, Orange River Colony, and Natal most probably felt no great eagerness to establish an upper house of too great strength. It is noteworthy that there is no attempt at a referendum

[1] Letters Patent, December 6, 1906, s. 37. Letters Patent, June 5, 1907, s. 39. The effect of these provisions is incorrectly stated in *The Government of South Africa*, i. 416.

[2] 63 & 64 Vict. c. 12, Sched. s. 57; Quick and Garran, *Constitution of Commonwealth*, p. 687.

[3] Save in the case of Bills for the appropriation of revenue or moneys for the public service (s. 63).

as has been recently arranged in Queensland:[1] the idea of a referendum does not seem a popular one in the Union.

III. The Provinces: Executive Government.

The provisions of the Act[2] for the administration of the Provinces are the most original in the whole Constitution, and are not unworthy of close consideration. The Provinces are not in any way to be set up as rivals to the Union, and therefore the system of government must not be a replica, in however faint a form, of the central government: the party system is to be continued in the ordinary central government, but it is not to be allowed to remain in force in the Provinces. Therefore the legislature of the Provinces is in no sense to be a Parliament and the executive is not to be an Executive Council, but an Executive Committee.

The head of the Administration is to be an Administrator, who will be appointed by the Governor-General in Council, preferably from among residents of the Province, and will hold office for five years, before which period he can only be removed by the Governor-General in Council for cause assigned, which shall be communicated to Parliament within a week after the removal if Parliament be sitting, and if not, within a week after the commencement of the next session. The Administrator will receive a salary fixed and paid by Parliament, and such salary cannot be diminished during his tenure of office. These provisions are borrowed from the practice of the Canadian Provinces, but in other respects the Administrator has no such important position as the Lieutenant-Governors of Canada, who have to govern with the help of Executive Councils commanding the assent of Parliaments.[3] The Administrator is to be assisted in carrying on the Executive Government by a Committee of four (three in the original draft) members, who are to be elected by the Provincial Council at its first meeting after each general election, according to the principle of proportional representation with the single transferable vote. The members are to receive salaries fixed by the Council, and will hold office until the appointment of their successors by the Council after the next general election. They need not be chosen from among the members of the Council, and if not so chosen they will, like the Administrator, be entitled to sit and speak but not to vote in the Council. Any casual vacancy will be filled by the Council if in session, or temporarily until the next meeting of the Council by the Committee itself, while if the number available at any time falls beneath the quorum required by the Committee's regulations, the Administrator is to summon a meeting of the Council for the purpose

[1] By an Act of 1908. *The Government of South Africa*, i. 417-23, suggests the possibility of a unicameral legislature; cf. a recent proposal to abolish the Senate in Canada, House of Commons Debates, 1909.

[2] Ss. 68, 69, 78-84. [3] See *e.g.* Canada Sessional Papers, 1900, No. 174.

of electing members to fill the vacancies. Pending their election the Administrator shall govern alone.

Subject to the provisions of the Act all the powers, authorities, and functions vested in the Governor or Governor in Council of the Colonies or any Minister by the existing law shall after the Union be administered by the Administrator, as far as such powers refer to such matters as to which the Councils are empowered to make Ordinances. In the administration of these questions the Administrator must act on the advice of the Committee, and in case of the equality of votes in the Committee the Administrator will have also a casting vote, but will not otherwise be able to override the members of the Committee. In all matters in respect of which no powers are reserved to or delegated to the Councils by the Act, the Administrator shall act on behalf of the Governor-General in Council if required to do so, but in that case he need not refer to any other member of the Executive Committee.

The Executive Committee has power with the consent of the Governor-General in Council to make rules for its procedure, and subject to the laws passed by the Parliament the Committee may appoint additional officers for Provincial affairs and lay down rules for their management and discipline.

It will be seen at once that this body is quite anomalous. In the first place the Administrator forms an integral part of it, and though this position may be said to be technically true of the Lieutenant-Governors of Canada, who are also *ex officio* members of the Executive Councils, the actual position is quite different. In Canada the Lieutenant-Governors do not preside in Council and do not debate with Ministers, not to speak of debating in Parliament. In the South African Provinces it is contemplated that not only will the Administrator speak in Council, but he will regularly preside in Committee and debate with his advisers, or rather his colleagues. He cannot dismiss them and he cannot overrule them in any Provincial matter. He must act as the majority decides. Moreover, the Committee itself will not be a political or party body; the mode of choice by proportional representation with the single transferable vote will probably secure that the members are not representatives of any one party at all: it is hoped that they will simply be a body of men chosen as the most suited for administrative work. New blood will be constantly introduced by the fact that each new Council will elect a new Committee, a power in which the Councils resemble County Councils in this country, and as the Council sits but three years the Committee can hardly acquire any too great power. Again, the right to go outside the Council will open up a wider area of choice than mere selection from the Council would allow. On the other hand, the members selected from the Council will still retain their seats there and the right to vote.

The Constitution of the Provincial Councils.—The Councils[1] themselves

[1] Ss. 70-7.

are not to be political. In each Province a Council is to be created consisting of the same number of members as there are elected by the Province to the Legislative Assembly, except that in Natal and the Orange Free State the number of members shall be twenty-five each. The members shall be elected in the same divisions as for the Assembly, and the divisions in the Colonies of Natal and the Orange River Colony will be delimited by the same Commission as will delimit the divisions for the Assembly elections and on the same basis. The qualifications for electors and members will be the same as in the case of Parliamentary elections for the lower house of the Union. The Councils shall be summoned to meet by the Administrator, who shall also be entitled to prorogue them, but there must be a session of each Council every year, so that there shall never be more than twelve months between the end of one session and the beginning of the next session. The Council shall elect its own chairman, and make rules of procedure, which can, however, be disallowed by the Governor-General in Council. The members shall receive allowances fixed by the Governor-General in Council, and shall be entitled to free speech. The Council shall last for three years and shall not be dissolved save by efflux of time.

The Council is therefore in no sense a Parliament. Its members are indeed elected as if for a Parliament and will be paid and given freedom of speech, but they cannot make rules which are not subject to disallowance by the Governor-General in Council, and their allowances are fixed by the same authority. Moreover, the Executive Government is not dependent on their favour: once elected it remains in office. At the same time the Executive cannot control the Council; it may thwart all their wishes for legislation, but it cannot be dissolved. Its real analogue is a municipal council, not a Parliament; and like a municipal council, its legislative power is far from being extensive, though it is important as dealing with matters of everyday life.[1]

Provincial Legislation.—We have seen that the Union Parliament is to have full legislative power to make laws for the peace, order, and good government of South Africa. But there is also set up a subsidiary legislative machinery which is to deal with provincial matters.[2] The subjects referred to the Provincial Councils are strictly limited in number and extent; they comprise (1) direct taxation within the Province in order to raise a revenue for provincial purposes; (2) the borrowing of money on the sole credit of the Provinces with the consent of the Governor-General in Council and in accordance with regulations to be framed by Parliament; (3) education

[1] The Australian States by their practically sole possession of the right to legislate in social matters (*e.g.* land tenure, industrial matters, etc.) preserve for the present their importance against the Federation. Factories and land come home more to the average citizen than defence, while customs—the other great branch of Federal activity—is not a constant subject of legislation.

[2] Ss. 85-91. Cf. *The Government of South Africa*, i. 257-66, ii. 152-57.

other than higher education for a period of five years, and thereafter until Parliament otherwise provides; (4) agriculture, to the extent and subject to the conditions to be defined by Parliament; (5) the establishment, maintenance, and management of hospitals and charitable institutions; (6) municipal institutions, divisional councils, and other local institutions of a similar nature; (7) local works and undertakings within the Province other than railways, harbours, and such works as extend beyond the borders of the Province, and subject to the power of Parliament to declare any work a national work, and to provide for its construction by arrangement with the Provincial Council or otherwise; (8) roads, outspans, ponts, and bridges, other than bridges connecting two Provinces; (9) markets and pounds; (10) fish and game preservation; (11) the imposition of punishment by fine, penalty, or imprisonment, for enforcing any law or Ordinance of the Province made in relation to any matter coming within any of the classes of subjects enumerated; (12) generally all matters which in the opinion of the Governor-General in Council are of a merely local or private matter in the Provinces; (13) all other subjects in respect of which Parliament shall by a law delegate the power of making Ordinances to the Provincial Councils. Moreover, a Provincial Council may recommend to Parliament the making of a law relating to any matter in respect of which the Council itself cannot pass an Ordinance, and in cases which must be dealt with by a private Act in the Parliament, the Provincial Council may, subject to such procedure as Parliament may lay down, take evidence by means of a select Committee or otherwise and report, and on the receipt of the report or evidence, the Parliament may pass the Act without requiring the taking of further evidence.[1]

Any Bill so passed by the Provincial Council shall be presented to the Governor-General in Council for his assent, and he must declare within a month that he assents or declines assent, or reserves the Bill for further consideration; in the last case he must assent, if at all, within a year from the first presentation for assent. The Administrator has no veto on legislation, and though he can speak in the Council, he does not vote.

Union Control of Legislation.—The last provision secures, of course, to the Union Government full control over the legislation of the Provinces. Moreover, it may be taken for granted that the control is intended to be exercised freely, and that there is no understanding that the provincial legislation should only be dealt with in so far as it contravenes the competence of the provincial legislatures. In Canada the claim has from time to time been asserted by the Provinces that in all matters of provincial competence the Dominion Government must not interfere, but though the Dominion Government have admitted that in most of the cases they should not interfere with provincial legislation, they have never hesitated to affirm in principle and in practice the right of the Dominion to control legislation

[1] Mr. Kilpin's suggestion, *ibid.* i. 414.

which runs counter to the general policy of the Dominion, even if that legislation be passed on some topic in respect of which the legislature of the Province alone is capable of deciding. So for many years the railway policy of the Dominion was carried out by disallowance of provincial legislation which conflicted with it.[1] The same rule will apply in the Union and with all the greater force inasmuch as the control of the Union over the Province is generally much greater than in Canada.

It appears clear that the legislative power of the Union is not fettered by this establishment of Provincial Councils, and that its legislation is paramount to any provincial legislation. It might, indeed, be argued that the Union Parliament could not legislate for merely provincial matters, as its function is to legislate for the peace, order, and good government of South Africa. But it is clear that the only judge of what is desirable for the peace, order, and good government of South Africa is the Parliament itself, and that to accomplish its ends it may deem that separate laws for each province are necessary. The Union Parliament can therefore legislate in any case on the same topics as the Provincial Councils, and such legislation is paramount (s. 86) and the Councils are at once placed in a hopeless state of inferiority as compared with the Canadian Provinces or the Australian States. It is true that the former, like the Councils, are liable to have their legislation disallowed on grounds of federal interest, but the Provinces possess in many matters exclusive powers of legislation, and even if the Dominion can prevent their legislation having effect, it cannot itself legislate on these topics. Struggles like that of Manitoba and the Dominion cannot conceivably occur between the Union and the Provinces. The Australian States, again, are independent of the Commonwealth as regards the allowance or otherwise of their Acts, and the Commonwealth has as a rule only a definite sphere of legislative activity, the residuary legislative power belonging to the State, which maintains a right to legislate on almost every topic which falls within the power of the Commonwealth, though such legislation is superseded by Commonwealth legislation to the extent to which it is actually in conflict with such legislation.

Further, the Provinces have a more limited sphere of power than the Provinces of Canada or the States of Australia. The Canadian Provinces have exclusive powers in such important matters as the alteration of the Constitutions of the Provinces, the management of public lands (though this privilege has been in part denied to Manitoba, Alberta, and Saskatchewan), the incorporation of provincial companies, the solemnisation of marriage, the administration of justice, property and civil rights, etc. It is true that many of these matters may be delegated to the Provincial Councils or may be declared by the Governor in Council to be of a local or private nature, but for these powers the Councils are dependent on the good will of Parliament. Even the control of and the appointment of officers for

[1] Cf. Bourinot, *Manual of Const. Hist. of Canada*, pp. 146, 147.

provincial purposes is made subject to the rules laid down by Parliament, whereas the Canadian Provinces possess that power in the fullest degree. The Australian States, as mentioned above, are still better off, as they can legislate on any matter subject merely to the possibility of conflict with a Commonwealth law on the subjects, by no means very numerous, on which the Federal Parliament has legislative power.

Union Control of Finance.—Moreover, in all matters of finance the Union Government possesses another means of control over the Provinces. No appropriation can be made save on the recommendation of the Administrator, whose warrant is also requisite for any expenditure,[1] and in recommending or issuing warrants it would appear—though it is not clear—that the Administrator will act as a Union official. Further, the Provincial accounts are to be audited by an auditor appointed by the Governor in Council and paid from Union funds, who will be only removable from office by the Governor-General in Council for cause assigned, which must be communicated to Parliament within a week of the removal, or within a week after the meeting of Parliament if it be not sitting at the date of the removal. The counter-signature of the auditor shall be essential for the validity of any warrant issued by the Administrator for the expenditure of money.[2]

Though the power of the Union Government over the Provinces is thus to be complete, there is no control reserved to the Imperial Government. The laws of the Provinces will not be subject to Imperial disallowance, and this point is one of considerable moment, in view of the fact that the power of assent or reservation is given not to the Governor-General, but to the Governor-General in Council,[3] a rule which prevails in Canada. Now the power of the Provincial Councils extends to matters which might easily affect vitally Imperial interests, *e.g.* legislation differentiating against British Indians and Japanese or Chinese.[4] No doubt the control and administration of matters affecting Asiatics specially or differentially are vested by s. 147 in the Governor-General in Council, but that provision in my opinion does not lessen the right of the Provinces to legislate within the limits of the authority so as to affect Asiatics. The effect of s. 147 is indeed very obscure as regards the point. Presumably in these cases the same principle would be adopted by the Union Government as by the Dominion Government, which is ever ready to consider Imperial interests in deciding as to the disallowance or otherwise of provincial legislation, as in the case of the British Columbia anti-Japanese Acts. The matter is, however, one of great importance, as it is perfectly clear that a Governor-General could only refuse assent in Council, and as we have seen, a Council must include Ministers, so that in the event of a dispute the Governor-General could only legally refuse assent by replacing Ministers by his own nominees, if he could find any prepared to aid him in his effort.

[1] S. 89. [2] S. 92. [3] S. 90.

[4] Contrast *The Government of South Africa*, ii. 153.

Comparison with New Zealand Provinces.—The nearest parallel to the arrangements as to the executive and legislative powers of the Provinces is to be found in the Provinces of New Zealand, created under the Act of 1852[1] granting a representative Constitution to New Zealand. In that case the General Assembly of New Zealand had full legislative power on all subjects, and in all its enactments could over-ride provincial enactments.[2]

The Provinces, however, had, subject to this paramount power of the General Assembly, authority to legislate on all matters of provincial interest,[3] excluding, however, legislation as regards duties of customs; the establishment of Courts of judicature, civil or criminal, except Courts for trial and punishment of offences made punishable in a summary way by the law of New Zealand; the regulation of currency, paper or money; the regulation of weights and measures; the regulation of the Post Office; legislation as to bankruptcy or insolvency; the erection and maintenance of beacons and lighthouses; the imposition of shipping dues; the regulation of marriages; legislation affecting Crown lands or lands to which the title of the aborigines had never been extinguished; laws inflicting disabilities or restrictions on persons of the native races to which persons of European birth or descent would not also be subjected; the alteration of the criminal law, except in so far as related to the trial and punishment of offences punishable in a summary way; and the regulation of the course of inheritance of real or personal property or legislation affecting wills.

The laws passed by the Provincial Councils were to be assented to or reserved or disallowed by the Superintendent, subject to any instructions which the Governor might from time to time give him. All Bills affecting the extent of the electoral districts of the Council, or establishing new electoral districts, or altering the number of members for the districts, or the number of members of the Council, or the limits of new towns required reservation. The Governor was empowered to disallow any Bill assented to by the Superintendent within three months after its receipt by him. The term was originally in the Bill fixed to two years, but it was reduced to three months while the Bill was passing through the Imperial Parliament, thus preventing, in view of the existing facilities of communication, any disallowance at the request of the Imperial Government, and leaving it to the discretion of the Governor what Acts should be disallowed. Similarly any reserved Bill had to be assented to within three months, or it became of no effect, and so the Governor was forced to act on his own discretion in deciding whether a reserved Bill should be allowed to come into force.

The Councils consisted of members elected by voters in the Provinces who had the same qualifications as voters for the General Assembly.

The Provincial Council lasted for four years, and it could be prorogue by the Superintendent, provided that there should be a session once every

[1] 15 & 16 Vict. c. 72. [2] S. 53. [3] Ss. 18, 19.

year so that not more than twelve months should intervene between the last sitting in one session and the first sitting in the next session. The Superintendent was not empowered to dissolve the Provincial Council, but the Governor had the power to dissolve it.

The position of the Superintendent was peculiar. He was elected by persons duly qualified in each Province to elect members for the Provincial Councils, and he held office until the election of his successor, who was elected as soon as possible after the dissolution or expiration of the Council. The Governor had the power to disallow any election, whereupon a new election had to take place, and at any time during the office of any Superintendent the Crown had the right to remove him from office on receiving an address signed by the majority of the members of the Provincial Council praying for his removal. The Superintendent was not assigned by the Act itself [1] any special executive authority, but that was merely in keeping with the general nature of the Act, which practically does not deal with the Executive Government at all. As a matter of fact he had a sphere of activity somewhat similar to that of the Administrators of the South African Provinces, and clearly he would have been entitled to act on his own responsibility, subject always to the possibility of his removal if the majority of the members of the Council desired him to be removed. The power, however, of removing him was simply facultative, although in fact it could be exercised according to the rules of responsible government, and the Superintendent would thus become a sort of elective Lieutenant-Governor.[2]

As a matter of fact the principle of Provincial Councils did not work well, and was eventually abolished in virtue of an Act passed by the Imperial Parliament in 1869 and carried into effect by an Act in 1875 of the Parliament of New Zealand, under which ordinary municipal institutions were substituted for the council system.[3]

In addition to its paramount power of legislation, the General Assembly had power to constitute new Provinces, to direct the number of members of which a Provincial Council should consist, to alter the boundaries of the Provinces, and to alter the provisions respecting the election of members of the Provincial Councils, the powers of the Councils and the distribution of the surplus revenue between the Provinces, provided that any such Bill required reservation for the Royal assent.

It was provided that after all the revenue appropriated by Parliament or charged by the Imperial Act itself had been provided for, the surplus should be divided among the several Provinces in the same proportions as the gross

[1] The Councils used to proceed strictly on party lines, like Parliaments, and the Superintendents exercised the functions then exercised by Governors.

[2] It must be remembered that the Act of 1852 throughout never refers to responsible government even for the main government of New Zealand.

[3] See *Appendix to Journals of House of Representatives*, 1876, vol. i, A 2 A.; the Abolition of Provinces Act, 1875.

proceeds of the said revenue should have arisen therein respectively. The Provincial Councils had also been empowered to raise revenue within the Provinces subject to the exceptions mentioned above.

It should, however, be noted that a certain degree of stability has been given to the Provincial Councils in South Africa by the requirement made at the Bloemfontein Conference for the reservation of Bills of the Union Parliament abolishing them or affecting their powers (s. 64). It is true that this requirement is not a very important one, for it merely introduces a certain amount of delay, and possibly a certain caution, in the Union Parliament, lest any step be taken which could prevent the assent of his Majesty being ultimately given to the proposed Bill. But in view of the relatively unimportant position of the Provinces under the Constitution it is hard to believe that any very substantial doubt could ever exist as to the acceptance of a Bill relative to the Provinces by the Imperial Government. The Union Parliament under any normal circumstances must be deemed the best judge of what legislative authority should be exercised by the Provinces. It is quite possible that in fact it may allow the Provinces great powers; it is more probable that it will exercise the greater part of the legislative functions of the country itself.

IV. The Judiciary.[1]

Appeals.—The Colonial Conference of 1907 discussed among other things a recommendation on this head by the Prime Minister for the Transvaal, which was in favour of the establishment of a single Court of Appeal in South Africa, from which no appeal should lie save by special leave to the Privy Council.[2] At present appeals can and do or may come direct to the Privy Council of right or by special leave from no fewer than three Courts in the Cape—the Supreme Court proper, the Court of the Eastern Districts, and the High Court of Griqualand—from the Supreme Courts of the Transvaal, the Orange River Colony, and Natal, the Witwatersrand Court, the Native High Court in Natal, the High Court of Rhodesia, and the Swaziland Court. Henceforth it is intended that all these Courts shall be consolidated into one Supreme Court for South Africa, which shall consist of two divisions, the Supreme Court and the Appellate Division. This division will include the Chief Justice and two ordinary judges, and two additional judges of appeal who shall from time to time be assigned from any of the local or provincial divisions of the Supreme Court to the appellate division by the Governor-General in Council, but who shall still do their ordinary work whenever their services can be spared. The Supreme Courts, including the High Court of the Orange River Colony and the Courts of the Eastern Districts of the Cape, the High Court of Griqualand, the Witwatersrand Court, and the several Circuit Courts, will be

[1] Ss. 95-116. [2] Cf. *The Government of South Africa*, i. 56 *seq.*, ii. 14 *seq.*

provincial and local divisions of the Supreme Court of South Africa and preserve their original jurisdiction plus jurisdiction in all suits in which the Union is a party or a Provincial Ordinance is challenged as invalid. They will also, unless Parliament otherwise provides, have jurisdiction in regard to electoral questions affecting the Parliament or the Councils.

In future appeals from the superior Courts of the old Colonies and from the High Court of South Rhodesia, from which at present appeals lie to the Supreme Courts of the Colonies—that is, in the case of the Cape, the Court of the Eastern Districts and the High Court of Griqualand and the Circuit Courts, and in the Transvaal the Witwatersrand Court—will lie only to the appellate division of the Supreme Court, save in the case of orders or judgments by a single judge on applications and motions of a minor character, or in the case of criminal appeals, when an appeal will lie to the provincial division, and there by special leave only of the appellate division to that division. Similarly all appeals which lie at the time of the Union to the Privy Council from any Supreme Court of the Colonies, including the High Court of the Orange River Colony, shall in future lie only to the appellate division, but the right of appeal in any civil suit shall not be limited by reason only of the amount claimed or awarded in any suit. From resident magistrates' and other inferior Courts in the Provinces appeal will lie to the divisions of the Supreme Court corresponding to the superior Courts to which appeals lay before the Union, but there will be no further appeal unless the appellate division of the Supreme Court gives special leave, when an appeal will lie to that division. There shall be no appeal from the Supreme Court or any of its divisions to the King in Council, but this prohibition is not to impair any right which the King in Council may be pleased to exercise to grant special leave to appeal from the appellate division to the King in Council. The Parliament may make laws limiting the matters in respect of which such special leave may be asked, but proposed laws containing any such limitation shall be reserved for the signification of His Majesty's pleasure. The appeal in Admiralty cases under the Colonial Courts of Admiralty Act, 1890, is, however, not affected by these provisions of s. 106.

These provisions are in harmony with the recommendations of the Colonial Conference, but it is important to note that they go a good deal beyond anything which yet exists in the Dominions. In the case of Canada appeals lie by right from nearly every Provincial Court to the Privy Council, and also in every case of course by special leave. Further, the Privy Council can grant special leave to appeal from the decision of the humblest Courts in the Provinces. In the case of the Dominion Supreme Court no appeal lies as of right,[1] but an appeal lies by special leave in every case save as regards criminal appeals, where the prerogative has been limited by a Canadian Act, though it is a good deal more than possible that

[1] Cf. *The Framework of Union*, pp. 158, 159.

that Act might be held to be inconsistent with the Imperial Act 7 & 8 Vict. c. 69, s. 1,[1] and therefore *ultra vires* the Canadian Parliament. In the case of the Commonwealth appeals lie by right and by special leave from all the State Supreme Courts and by special leave from inferior Courts; from the Commonwealth High Courts appeals lie only by special leave, and in certain instances all appeals are prohibited save by the permission of the Court itself, viz. in cases involving the question of the rights *inter se* of the Commonwealth and the States or any two or more States. But even in cases of this sort an appeal could be brought by special leave from an inferior Court exercising federal jurisdiction except in the case of the Supreme Courts of the States, which are not allowed by a Commonwealth Act of 1907 to deal with such cases at all.

In the case of the Union the right to grant special leave to appeal from any Court whatever in South Africa is apparently intended to be abolished, save as regards the appellate division of the Supreme Court, though the case of the inferior Courts which are not divisions of the Supreme Court seems to be overlooked. This rule will clearly reduce to the minimum appeals from South Africa, as the only cases which can come to it are those which have run through the Appellate Court. This proposal has no doubt advantages, inasmuch as any case which came to the Privy Council will have been reconsidered by the most authoritative opinion of South Africa, and any possibility of error based on the ignorance of the members of the Judicial Committee of Roman-Dutch law will be obviated. It is, however, a question which is not quite clear how far the words of the Bill are adequate to produce this effect, as the prerogative is not very explicitly barred except perhaps as regards the Supreme Court itself.

Appointment and Dismissal of Judges.—The judges of the Supreme Court will in future be appointed by the Governor-General in Council, and will have salaries which cannot be reduced during their tenure of office. They can only be removed from office by the Governor-General in Council on an address from both houses of Parliament in the same session praying for such removal on the ground of misbehaviour or incapacity.[2] The exact provision in these cases is somewhat interesting. It is more definite than the simple rule as laid down in the case of Natal,[3] which merely requires the address and says nothing as to the ground: on the other hand, it is not so specific as in the case of the Transvaal and Orange River Colony, in which, following the model of the Commonwealth, proved misbehaviour or incapacity is specified as the ground of removal.[4] Practically there is no difference

[1] That section is confined to allowing appeals by special leave from any Court even if not a Court of Appeal, but it implicitly gives the power in the case of Courts of Appeal. But it has not been acted on in the case of Canada since the Act of 1888 (51 Vict. c. 43, s. 5) of Canada. [2] Ss. 100, 101. [3] Act No. 14 of 1893.

[4] Letters Patent, December 6, 1906, s. 48; Letters Patent, June 5, 1907, s. 50.

between the position in the Commonwealth and in South Africa, but the addition of the word "proved" in the Commonwealth Act can only be inconvenient, and it is lucky that it has been omitted in the case of South Africa. No doubt the Parliament will not pass any address unless and until it has satisfied itself that the judge in question has deserved dismissal, and the procedure will probably be by investigation by a commission, as in the Canadian cases of Judges Lafontaine and Loranger.[1] Of course the actual need of any such action is extremely small, but the provision at once ensures the complete independence of the judiciary for all practical purposes, while preserving in the last resort the power of the Government to rid itself of a judge whose conduct has been so unsatisfactory as to render Parliament willing to dispense with his services.

The existing judges of the colonial Courts are all continued in their posts in the corresponding divisions of the Supreme Court, the Chief Justices becoming Judges President but retaining their titles for the rest of their term of office, and the pensions and salaries to which at present they are entitled are ensured to them. In the case of an occurrence of a vacancy in the divisions of the Supreme Court, the Governor-General in Council, if he considers that the number of judges may advantageously be reduced, may refrain from filling up the vacancy pending the decision of Parliament. No doubt in due course advantage will be taken of this provision to reduce the numbers of judges in South Africa.

The appellate division shall be composed of the full five members in the case of an appeal from any Court composed of two or more judges; if the appeal is from a decision of a single judge, three members of the division will be a quorum, and no judge shall take part in the hearing of an appeal from a decision of his own. The Court will normally sit in Bloemfontein, but may from time to time, for the convenience of suitors, hold its sittings at other places in the Union. This provision (s. 109) is a concession to the Orange River Colony, which of course will be the seat of neither the administrative nor the legislative capital of the Union. The Chief Justice and the ordinary judges of appeal may make rules for the regulation of the proceedings in the appellate division, and these rules on approval by the Governor-General in Council will be binding. Similarly the Chief Justice and other judges of the Supreme Court can make rules of procedure for the provincial and local divisions which will be subject to the approval of the Governor-General in Council. Until such rules are made, the existing rules will apply to each provincial or local division, while the procedure of the appellate division will be that of the Supreme Court of the Cape.

As a result of the unification of the Courts of the Colonies, in future

[1] Bourinot, *Manual of Const. Hist. of Canada*, p. 151, n. 3. The Constitution provisions will exclude the operation of Burke's Act, which allows a motion by the Governor in Council. See my *Responsible Government in the Dominions*, pp. 277, 278.

any provincial or local division in which an action is begun shall be entitled to order its transfer to another division if that be deemed more convenient. Again, the judgments of each provincial division can be registered in any other division and enforced by execution if necessary. The judgments of the appellate division shall be recognised throughout the Union and enforced in each province as if they were judgments of the provincial division.

The laws regulating the admission of advocates and attorneys to practise in the present Courts will apply to the admission of advocates and attorneys to practise before the provincial divisions of the Supreme Court, and the members of the provincial legal profession who have the right to practise before the divisional Courts shall be able to appear before the appellate division. There is, however, no attempt to assimilate generally the legal profession in the Provinces.[1]

The moment the Union is established, all suits, criminal or civil, pending in the various superior Courts, will *ipso facto* be transferred to the corresponding division of the Supreme Court of South Africa. Presumably the appeal from the judgment in the case in question would be regulated by the provisions of the Act, though the section is not quite explicit, and the effect of the Act is to alter a right possessed at the moment when the suit was initiated, possibly a right on the strength of which the suit was begun; but in any case the Act explicitly does not affect pending appeals to the King in Council from judgments already delivered before the Act came into operation.

The administration of justice[2] throughout the Union shall be vested in a Minister of State, who shall acquire all the powers vested in the Attorneys-General of the Colonies at the time of the union, save that the powers as to the prosecution of crimes and offences will be vested in an officer in each Province appointed by the Governor-General in Council, who shall be styled the Attorney-General of the Province in question and who shall also carry out any other duties assigned to him by the Governor-General in Council. The Crown Solicitor in the Eastern Districts of the Cape and the Crown Prosecutor for Griqualand West are also continued in office.

V. The Civil Service.

All the officers of the public service[3] in the various Colonies at the time of the union will become officers of the Union. As soon as possible after the passing of the Act, the Governor-General in Council shall appoint a Commission to make recommendations for the reorganisation and readjustment of the service, and for the transfer of officers to the Provinces. After the Commission has reported, the Governor-General may transfer officers

[1] Cf. *The Government of South Africa*, i. 66. [2] S. 139.

[3] Ss. 140-46. The appointment and dismissal of officers are dealt with in s. 15. They rest with the Governor-General in Council. See above, p. 49.

from time to time to the provincial services, and pending such transfer he may with the advice of the Council place the services of Union officers at the disposal of the Provinces. Special rules will, however, apply to persons under the control of the Railway and Harbour Board. After the Union is established, a permanent civil service commission shall be appointed with such powers as to appointment, discipline, retirement, and superannuation of public officers as Parliament may determine. Any officer who is not retained in the public service as the result of the Union shall receive the same treatment as he would have been entitled to receive on abolition of office under the Government of which he was a servant. Those who are retained shall have all their existing and accruing rights made good to them, and can retire on such pension and at such age as they could have done under the law of the Colony in which they originally served. The services of no officer are to be dispensed with simply because he does not know Dutch or English. Special provision is to be made by Parliament if necessary for the permanent officers of the Colonial Parliaments who may lose office because of the Union.

The provisions are not at all ungenerous and are evidently designed to obviate the hostility to the Union of the great body of public servants in South Africa. None the less the demands made upon the anxiety of public servants for the best interests of the South African States is shown by the fact that they will many of them undoubtedly lose their posts by the operation of the amalgamation of the services of the Colonies. It is true that many posts will still be preserved, but it is equally certain that there must be a total very considerable reduction, especially in the better paid offices. At the same time, the pensions payable on abolition of office will be a small consolation to those for whom places cannot be found in the new administrations.

VI. The Language Question.

The new Constitution provides by s. 137 that both the English and Dutch languages shall be official languages of the Union, and shall be treated on a footing of equality, and possess and enjoy equal freedom, rights, and privileges. All records, journals, and proceedings of the Union Parliament shall be kept in both languages, and all Bills, Acts, and notices of general public importance or interest issued by the Government of the Union shall be in both languages.

The clause was admittedly a triumph for the Dutch party, and it appears from the press that Dr. Jameson was originally opposed to any compromise on this ground, but that he eventually concluded that it would be desirable to concede the point, as the Dutch people in the Union would feel any inferiority of language as a political inferiority. The concession now made is fundamental and important. In the case of Canada, the provision of the

British North America Act[1] on this subject is that either the English or the French language may be used by any person in the debates of the houses of the Parliament of Canada and of the houses of the Legislature of Quebec, and both these languages shall be used in the respective records and journals of these houses, and either of these languages may be used by any person, or in any pleading or process in or issuing from any Court of Canada established under this Act, and in or from all or any of the Courts of Quebec. The Acts of the Parliament of Canada, and of the Legislature of Quebec, shall be printed and published in both languages. These provisions thus apply within very distinctly defined limits, and while some French-speaking members of the Canadian Parliament speak in French, many speak in English. Again, Bills are not necessarily printed in French at all; the requirement of printing in both languages applies only to Acts. French is not in any sense an administrative language; the exact position occupied by it is illustrated by the fact that recently the Minister for the Post Office[2] found it necessary to reorganise his staff, as he had no one available to answer questions and letters from French Canadians in French. In the case of the Transvaal the rule laid down by the Letters Patent[3] is that debates may be carried on in English or in Dutch, and that the votes and proceedings and proposed laws shall be printed in both languages, but all journals, entries, minutes and proceedings of the Legislative Council and Legislative Assembly shall be recorded in English only, while laws are printed in both languages. The same rule is laid down in the case of the Orange River Colony by the Letters Patent of 1907,[4] and in both cases the practice is based on that of the Parliament of the Cape under Law No. 1 of 1882, where also by Law No. 21 of 1884 Dutch is recognised in judicial proceedings. It will be seen that in the cases mentioned there is no attempt to make Dutch have a position of equality; it is recognised and accorded fair treatment, but not given an equal position with English. The same difference appears in a small point; under the Transvaal[5] and the Orange River Colony Constitutions[6] it is expressly provided that the copy of the law signed by the Governor, and enrolled in the office of the Registrar of the Supreme Court as final evidence of the law as passed, shall be in English, whereas under the Union Constitution[7] there are to be two fair copies prepared, one in English and one in Dutch, and the Governor-General is to sign one—which, is left for him to decide—and that one will be decisive in the case of any difference appearing between the two texts, both of which will be enrolled in the office of the Registrar of the Supreme

[1] 30 Vict. c. 3, s. 133. The "Hansard" appears both in English and in French, and the appearance of the French version has recently been accelerated.

[2] See Canada House of Commons Debates, 1909, 749.

[3] Letters Patent, December 6, 1906, ss. 34 and 44.

[4] *Ibid.* June 5, 1907, ss. 36 and 46.

[5] *Ibid.* s. 45. [6] *Ibid.* s. 47. [7] S. 68.

Court, appellate division. In Quebec there is no definite provision on this head save that contained in s. 2615 of the Civil Code which adopts the principle of consistency with the general meaning of the law in case of dispute.

The placing of Dutch and English on an equality will entail the officers of the Union becoming familiar with both languages. On the whole this rule, which is not to be applied to existing officers, can hardly be deemed improper, as South Africa is essentially a bilingual country, and it is perhaps only fair that the officials should make themselves familiar with the language of a substantial minority of the people. On the other hand, the rule will no doubt tell against English applicants for posts, as those who are likely to be their competitors will have a certain advantage derived from the fact that Dutch children and young men are more likely to pick up English than English youths to pick up Dutch. Moreover, the duplication of languages will cost a good deal of money and it mitigates against the adoption of English as the universal language of South Africa, an ideal desirable on many grounds. English is in many ways a much superior language to the Dutch of South Africa, and it is a pity to perpetuate divisions of speech amongst one people. But of course these arguments are of no weight in the face of the feeling of the Dutch in South Africa,[1] and the frank recognition of the equality of Dutch may lead those who press for its equality with English to cease to demand its actual use so long as its theoretic rights are respected. Nevertheless, the recognition given to Dutch is unparalleled in the Dominions, and runs counter to the general trend of recent policy in the Crown Colonies, for example in Malta.

VII. Financial Provisions.

The financial clauses[2] are of considerable importance and are somewhat lengthy. All revenues, from whatever sources, over which the Colonies have at the time of union power of appropriation shall vest in the Governor-General in Council.

There shall be formed a Railway and Harbour Fund into which shall be paid all revenues from the administration of railways, ports, and harbours, and such fund is to be appropriated by Parliament for the purposes of the railways, ports, and harbours.[3] All other revenues are to be paid into a Consolidated Revenue Fund which is to be appropriated by Parliament

[1] For the use of the two languages in education, cf. *The Government of South Africa*, i. 184 *seq.*

[2] Ss. 117-33.

[3] The Board is partly a continuation and extension of the Railway Board of the Central South African Railways, partly an imitation of the Commissioners who manage Railways in the Australian States (*The Government of South Africa*, ii. 131-5). But characteristically full Ministerial responsibility exists here. Ports are now governmentally controlled in the Cape and Natal, *ibid.* i. 198, 199.

for the purposes of the Union. The Governor-General in Council is to appoint as soon as possible a Commission consisting of one representative of each Province, with an Imperial officer presiding, to inquire into the financial relations which should exist between the Union and the Provinces. Until that inquiry is completed and until Parliament has taken action on it, there shall be paid annually from the Consolidated Revenue Fund to the Administrator of each Province an amount equal to the sum provided for education other than higher education, in respect of the financial year 1908-9 in the estimates of the Colony and voted in 1908 by the Parliament, and such further sums as the Governor-General in Council may consider necessary for the due performance of the services and duties assigned to the Provinces. During this period the Executive Committees are to submit annual estimates of expenditure to the Governor-General in Council, and no expenditure shall be incurred by any Executive Committee without the approval of the estimates by the Governor-General in Council.

Under the original draft the annual cost of raising the revenue was to form the first charge, and the annual interest of the public debts and any sinking funds were to form the second charge on the Consolidated Revenue Fund, which after defraying these charges can be appropriated by Parliament.[1] The Bloemfontein Conference gives the preference to debt charges, and apparently the cost of collection will now need special appropriation. For a period up to two months after the first meeting of the Parliament the two funds may be drawn upon by the Governor-General in Council, but subject to that provision no moneys shall be withdrawn from either fund except under appropriations made by law.

All stock, cash, bankers' balances and securities, Crown land, public works and all movable or immovable property, and all mining and other rights belonging to the colonial Governments shall vest in the Governor-General in Council, in each case subject to any debt or liability specifically charged thereon. In return the Union shall assume all the debts of the Colonies as they stood at the time of the Union,[2] subject in all cases to precisely the same conditions as exist at present. Subject to these conditions, the Union may renew, convert, or consolidate the debts.

Railway Board.—Similarly all ports, harbours, and railways belonging to the Colonies shall vest in the Governor-General in Council. No public railway and no port, harbour, or similar work shall be constructed without the sanction of Parliament. Subject to the authority of the Governor-General

[1] No special appropriation is required in the case of debt charges, nor, it may be noted, for the Governor-General's salary (s. 10). The rule is the same in the constitutions of the self-governing Colonies generally.

[2] In the case of Australia the right of the Commonwealth to assume the debts of the States as they stood at federation has not yet been exercised, pending some agreement with the States as to financial arrangements on the expiration of the "Braddon" clause as to division of customs revenue; but steps to effect this result are now being taken. For South Africa debts cf. *The Government of South Africa*, ii. 218 *seq.*

in Council the control and management of railways, ports, and harbours shall be vested in a Board of not more than three commissioners appointed by the Governor-General in Council and a Minister of State, who shall be chairman. The commissioners will hold office for five years and can only be dismissed within that period for reasons assigned and laid before Parliament within a week after the removal if Parliament be sitting, or if not, within one week after the commencement of the next ensuing session. The salaries of the commissioners shall be fixed by Parliament and shall not be reduced during their terms of office.

The railways, ports, and harbours shall be administered on business principles,[1] but due regard shall be paid to the agricultural and industrial development of the Union and promotion by means of cheap transport of the settlement of an agricultural and industrial population in the inland portions of all the Provinces of the Union. So far as may be the total earnings shall only be sufficient to meet the necessary outlays for working, maintenance, betterment, depreciation, and the payment of interest due on the capital not being capital contributed out of railway or harbour revenue and not including any sums payable out of the Consolidated Revenue Fund, in accordance with the provisions of ss. 130 and 131 of the Act, which deal with the case of loss on lines not approved by the Board and on the provision of unremunerative facilities. The amount of interest due on such capital invested shall be paid from the Railway and Harbour Fund into the Consolidated Revenue Fund. Effect is to be given to this section as soon as practicable (and not later than four years) after the establishment of the Union. In that period if the general revenues are insufficient and there is an excess on railway and harbour earnings, Parliament may appropriate the excess for general purposes.

The Board may establish a fund out of railway and harbour revenue to be used for maintaining uniformity of rates despite fluctuations of trade. The Board shall become possessed of all balances to the credit of any Railway or Harbour Fund in the Colonies existing at the union.[2]

Railway Construction.—Every proposal for railway, port, or harbour construction must be considered by the Board before submission to Parliament, and the Board must report and advise whether the work should or should not be carried out. If the work is carried out despite the views of the Board, and the Board consider that the revenue from the work will not meet the costs of working, maintenance, and interest of the capital invested, it shall submit an estimate of the annual loss, which, when approved by the Comptroller and Auditor-General, will be made

[1] This rule is intended to guard against the bringing of political pressure to bear on the Commissioners for the construction and working of non-economic railways and in questions affecting discipline, both matters which have caused great trouble in the Australian States.

[2] Cf. *The Government of South Africa*, ii. 138-47.

good from the Consolidated Revenue Fund, provided that if in any year the actual loss is less than the estimate, only so much will be made good. In calculating the loss, regard is to be had to the value of contributions of traffic to other parts of the system. If also the Board is required by the Governor-General in Council or by Parliament to provide gratuitous or unremunerative services, the amount shall be made good from the Consolidated Revenue Fund.

Comptroller and Auditor-General.—Provision is also made for the appointment of a Comptroller and Auditor-General by the Governor-General in Council.[1] He shall hold office during good behaviour, and can only be dismissed by the Governor-General in Council on an address from both Houses of Parliament, though when Parliament is not sitting the same authority may suspend him on the ground of incompetence or misbehaviour, and must confirm the suspension unless an address is presented from the two houses of Parliament in the next session praying for his restoration to office. Pending the decision of Parliament his duties will be appointed by the Governor-General in Council.

Subsidies to Former Capitals.—The diminution of prosperity to Pietermaritzburg and Bloemfontein from their ceasing to be the seats of Government in their respective Colonies is to be made good in part by a grant from the Consolidated Revenue, for a period not exceeding twenty-five years, of the sum of 2 per cent. per annum on the municipal debts as existing on January 31, 1909, and as ascertained by the Comptroller and Auditor-General.[2] The Commission appointed to decide the financial relations of the Union and Provinces may also award compensation to the municipalities of Cape Town and Pretoria if it considers it desirable, such compensation not to exceed 1 per cent. for twenty-five years on their municipal debts at January 31, 1909. One-half of any such grants shall be applied to the redemption of the debts of the towns concerned, so that at the end of the period the principal sums due should be substantially diminished. At any time after the payment of the tenth annual grant to any town the Governor-General in Council, with the approval of Parliament, may withhold or diminish the grant made.

More important is the fact that the Transvaal has decided to make large concessions to both the Cape and Natal on railway matters. For years the most burning internal question in South Africa has been that of the division of traffic between Delagoa Bay, Natal, and the Cape ports.

[1] The provision for an Auditor is not usual in colonial Constitutions, though, of course, colonial Acts regularly provide for the post and its powers, and the Acts are based on the same principles as the Union Act, s. 132. See Canada Revised Statutes, 1906, c. 24; Commonwealth Audit Acts, 1901 and 1905; *The Government of South Africa*, i. 320.

[2] S. 133. By ss. 18 and 23 Pretoria becomes the administrative, Cape Town the legislative capital. The arrangement is illogical and a compromise; it is neatly criticised in *The Empire Review*, xviii. 117.

Not only has the Delagoa Bay route the natural advantage of distance from the mining centre of the Transvaal, but the mining industry on which the whole greatness of the Colony rests is vitally interested in preserving access to the recruiting ground for native labour for the mines existing in the Portuguese territories. Hence one of the first actions of Lord Milner in the administration of the Transvaal was to conclude with the Government of Moçambique an agreement for the right of access to that source of labour in exchange for the maintenance to the port of the advantage over the Cape and Natal ports which it enjoyed while the Transvaal was a Republic hostile to the British Colonies, through the fixing of the railway rates for the transit to the port from the mining area. Naturally the other Colonies resented this position, and as naturally the Transvaal was not prepared to yield so long as it required native labour.[1] It is therefore of great importance that the Transvaal has been able to promise to the two Colonies concerned one-half of the trade, 30 per cent. to Natal and 20 to the Cape, while the rest goes to Delagoa Bay. The proportions recently in force have been 24 per cent. to Natal and 12 per cent. to the Cape, so the change will be a popular one. This concession by the Transvaal to Natal, coupled with the grant by the Cape of the right to an excessive representation of seventeen members in the House of Assembly, instead of the twelve to which it is qualified by the population, were designed to render that Colony disposed to accept unification instead of federation, to which the most prominent Natal statemen have leaned.

There is not much of constitutional interest in these financial clauses. They avoid any such difficulty as now faces the Commonwealth, that of settling the proportions of revenue from customs to be assigned to the central and the State Governments, a problem which seems almost incapable of satisfactory settlement. On the other hand, it seems very doubtful whether the new Constitution will fulfil the hopes of the framers for economy; it appears that so impartial a judge as Mr. Merriman has expressed himself with hesitation on this topic. The attempt to take the railways out of direct political management is noteworthy,[2] as there is no doubt that in the Dominions generally there is too much tendency for the Government to construct lines—as has notoriously been done in the Cape—on purely partisan considerations, but its success is doubtful.

There is to be free trade throughout the Union, but otherwise the existing tariffs and excise duties will remain in force (s. 136).

VIII. Treaties.

It is expressly provided by the Constitution that the Union shall become responsible for any treaties binding on the Provinces before

[1] See Parliamentary Paper [Cd. 3564], pp. 20 *seq.*

[2] Cf. *ibid.* pp. 65 *seq.*

unification,[1] and the agreement of February 2, 1909, between the Cape, Natal, and the Transvaal as to railway traffic is treated as a treaty.

Under the Commonwealth Constitution there is no corresponding provision. It has been held by the Commonwealth Government, though the argument has not been accepted, and could not be accepted, by the Imperial Government, that all treaties binding on the States of the Commonwealth before federation ceased *ipso facto* to be binding at all by federation. This argument, which is based on the analogy of independent States, and is invalid in the case of parts of one Empire, has not been accepted by the Imperial Government, and in practice the Government of the Commonwealth has accepted the position that it remains bound in respect of the Colonies affected by treaties concluded before federation.[2]

In the case of Canada, the matter was settled once and for all by the British North America Act, s. 132 of which provides that the Parliament and Government of Canada shall have all powers necessary or proper for performing the obligations of Canada, or of any Provinces thereof, as part of the British Empire towards foreign countries, arising under treaties between the Empire and such foreign countries. Though this section does not expressly state that the treaties which affected the Colonies before federation shall be binding on Canada in respect of Provinces so affected after federation, it has no meaning except on this understanding, and the Canadian Government have accepted the position that they are bound in respect of any treaties which were binding on the Colonies before federation so far as regards such Colonies as were bound.

It was therefore held that the Commercial Treaty of 1862 with Belgium, and of 1865 with the North German Confederation, bound Canada and prevented her giving preferential treatment to Great Britain, with the result that these treaties were in due course denounced after discussion of their provisions at the Colonial Conference of 1897.[3]

It may be taken therefore as clear that the obligations of the Union in respect of the treaties will apply only with regard to the provinces which as Colonies were actually bound by the treaties. It is indeed obvious that though the Imperial Act might extend the obligation of the treaties over the whole Union, the advantages of the treaties could not be claimed by virtue of an Imperial Act without the consent of all the Powers with which treaties existed.

Legislative Power in Treaty Matters.—In the case of Canada, the

[1] S. 148.

[2] See Parliamentary Paper [Cd. 3288], p. 6; [Cd. 4355], p. 12. The Navigation Bill as actually introduced into the Senate accepted liability (s. 414) for all treaties binding on any State so far as that State was concerned, and the validity of the Queensland adherence to the Japanese treaty of 1894 was recognised by notice being given of the termination of that adherence.

[3] See Parliamentary Paper [Cd. 1630]. The treaties were concluded before federation and before the admission to federation of the later acquired Provinces.

section quoted gives full legislative power to the Federal Parliament in any treaty matter, and therefore it may be presumed that if a treaty existed, the Federal Parliament would have legislative power, even though the subject-matter of the legislation were one which under s. 92 of the British North America Act falls otherwise within the exclusive legislative competence of the provincial legislatures.

As a matter of fact, as was stated in a recent debate in the Canadian Parliament by Mr. Borden, leader of the Opposition, the question does not appear to have been formally decided in the Canadian Courts or by the Privy Council, and the constitutional practice is in Canada for the Canadian Government to accede to treaties concerning matters in which the Federal Parliament has not normally legislative powers only with the consent of the provincial governments, which can thus be relied upon to legislate if legislation be needed to carry the treaty into effect. For example, the Canadian Government has not acceded so far to the recent International Convention for the regulation of night work of women, as some of the Provinces are not prepared to legislate on the matter. At the same time the right of the Dominion Government to over-ride the Provinces, and to legislate if need be to make good a treaty obligation, seems not to be seriously doubted.[1]

In the case of the Commonwealth, the right of the Commonwealth Government with regard to treaty matters is extremely obscure. One of the drafts of the Constitution Act would have given them adequate power, as it included among the subjects which the Commonwealth could legislate for, and if necessary over-ride State legislation, "external affairs and treaties," but in the final draft[2] the words "and treaties" disappeared, and it must remain a matter of doubt, pending settlement by the Courts, whether the power given to the Commonwealth to legislate for external affairs enables the Parliament to pass legislation on a matter on which the Commonwealth has not normally any legislative power, simply because a treaty exists regarding it.[3]

In the case of the Union, as the Parliament of the Union has a paramount legislative power on every subject, no difficulties could arise, and the Union will no doubt not consult the provincial councils or the governments in any way in deciding whether to adhere to any given treaty or not.

The Union will also take its place beside Canada and Australia as being entitled to voting power at international conferences on subjects not political.

[1] Cf. the case of the Waterways Treaty of 1909 with the United States, which partly involves provincial matters, and which has been informally discussed with the Provinces concerned. See Canada House of Commons Debates, 1909, May 14; my *Responsible Government in the Dominions*, p. 136, note.

[2] Schedule to 63 & 64 Vict. c. 12, s. 51 (xxix). Cf. Quick and Garran, *Const. of Commonwealth*, pp. 631 *seq.*

[3] See Parliamentary Paper [Cd. 1587], esp. p. 14, for Mr. Chamberlain's views.

Already under the Wireless Telegraphy Convention one vote is assigned to the Colonies adhering (excluding Orange River Colony), and at the last Postal Conference the Cape vote was really exercised on behalf of the Colonies collectively.[1]

IX. Naturalisation.

It is expressly provided by s. 138 of the Bill that all persons naturalised in any part of the Union shall be deemed to be naturalised in the whole of the Union. This provision is of obvious convenience and of value; it has no parallel in the North America Act or in the Commonwealth Constitution Act, but in both these cases subsequent legislation, under the power to legislate for naturalisation given to the Dominion[2] and the Commonwealth[3] by the Constitution, has brought about a similar state of affairs, and naturalisation is granted under Acts of the Commonwealth and the Dominion which make it apply to the whole Dominion and Commonwealth respectively. The effect of such naturalisation was, however, in the case of the Union under the original draft Constitution only extended in the case of Europeans, and the somewhat anomalous and unsatisfactory position still remained that natives naturalised in any of the Provinces would continue only to be British subjects in the Provinces in question. This result was unfortunate and unsymmetrical, and indeed it was in reality a contravention of the whole spirit of the Union. The creation of a Union was intended to substitute for four separate Colonies a single Colony, and to perpetuate separation of the Provinces by this provision was contrary to the whole principle of the Union itself. It is difficult to see what practical advantage could have been gained from a situation which was legally anomalous,[4] and fortunately the clause was amended at the Bloemfontein Conference by the omission of the word "European."

X. Entrance of New Provinces and Territories.

Provision[5] is made upon addresses from the Houses of the Union Parliament for the future entry into the Union of the territories administered by the British South Africa Company, on such terms and conditions as to representation and otherwise as are in the addresses expressed and approved by the King, and the provisions of any Orders in Council

[1] Cf. *The Government of South Africa*, i. 220.

[2] British North America Act, 1867, s. 91 (25). See now Revised Statutes, 1906, c. 77.

[3] Commonwealth of Australia Constitution Act, 1900, s. 51 (xix). See Naturalisation Act, 1901.

[4] Cf. also *The Government of South Africa*, i. 157 *seq.*

[5] S. 150. Parliament may also (s. 149) at the request of any Provincial Council or Councils affected alter the boundaries of any Province, divide a Province into two or more Provinces, or form a Province out of existing provincial areas.

in that behalf shall have effect as if they had been enacted by the Imperial Parliament.

This clause applies to the territories under the Government of the British South Africa Company, viz. Southern Rhodesia, North-eastern Rhodesia and Barotzeland—North-western Rhodesia. It would probably be impossible to include them forthwith in the Union, inasmuch as the rights of the Company must be in some way disposed of before the territories can be part of the Union.

The position is somewhat analogous to that of the Hudson's Bay Company, as compared with the Dominion of Canada before the amalgamation in 1870, when the rights of the Hudson's Bay Company were formally bought out by the Canadian Government. Presumably in the long run a similar course must be adopted in South Africa, and the British South Africa Company must receive some compensation for the moneys expended by them in establishing British rule in Rhodesia.[1]

The mode of procedure is similar to that adopted in the case of Canada;[2] the exact terms on which the incorporation is to take place will be laid down in the Order in Council, and the Order in Council will then have the same effect as an Imperial Act. Presumably, therefore, it will not be possible for the Union Parliament to amend the provisions of the Order in Council, for the power of alteration of the Constitution given in s. 152 applies only to the provisions of the Union Act itself, and does not apply to the provisions of any other Imperial Act, and the Order in Council is not incorporated in the Union Act, but is given the force of an Imperial Act. This point, however, is not without difficulty, inasmuch as it would create a difference between the position of the original Provinces, whose relations to the Union are subject to alteration by the Union Parliament, and Provinces which subsequently joined, and whose relations to the Union would apparently be beyond the control of the Union Parliament, and possibly the clause may have been borrowed without adequate consideration from the Canadian Act. The clause itself could be varied by Parliament and so the relation of the Provinces might perhaps thus be altered.

On the other hand this difference in treatment is not without justification in consideration of the fact that the character of the terms offered would probably add an inducement to any territories not at first included in the Union to join the Union.

Transfer of Native Territories.—Separate provision is made with regard to the transfer to the Union of the government of any territories, other than the territories administered by the British South Africa Company, of or under the protection of his Majesty, inhabited solely or in part by natives, which may be transferred by his Majesty, with the advice of the Privy Council on addresses from the houses of Parliament of the Union.

[1] Cf. Report of B.S.A. Company for 1908.

[2] Cf. Wheeler, *Confederation Law of Canada*, pp. 755 *seq.*

Upon such transfer the Governor-General in Council may undertake the government of the territory upon the terms and conditions embodied in the schedule to the Union Act.

That schedule is an important and remarkable document, and its inclusion is without precedent in either the Canadian or Australian Federation Act.[1] It lays down a definite set of conditions for the government of the native territories which may be transferred, viz. Bechuanaland Protectorate, Basutoland, and Swaziland.

In all probability the procedure of including these provisions in the schedule to the Act, which was due to the wishes of the Imperial Government, secures a more satisfactory settlement of the terms of transfer than would be arrived at if the matter were left for negotiation afterwards between the Union and the Imperial Government. As part of the Union Act, the provisions will represent a compromise under which it may be expected that the interests of the territories will be at least as adequately provided for as could be done later.

At present the territories in question are administered by the Imperial Government through the High Commissioner for South Africa, who alone possesses legislative power in those territories. They are held on different titles; Bechuanaland is a Protectorate, and the power of the High Commissioner is theoretically derived from the Foreign Jurisdiction Act, 1890.[2] Basutoland is a Colony by cession, and the power of the High Commissioner rests on the Royal prerogative to legislate for a Colony by cession or conquest. Swaziland was a Protectorate of the late South African Republic in which *de facto*, if not *de jure*, the South African Republic had before the annexation acquired full legislative power, and the High Commissioner legislates for Swaziland by virtue of the authority thus acquired by the South African Republic and transferred, on annexation of the Transvaal, to His Majesty.[3]

Legislation for Native Territories.—In each case Orders in Council have been issued, under which the administration is carried on, and the High Commissioner legislates by Proclamation. In future, after the transfer of the government, the Governor-General in Council[4] shall be the legislative

[1] In Australia Papua has been transferred to the Commonwealth with its consent by the Imperial Government without conditions, and its administration is provided by the Papua Act, 1905, passed in virtue of 63 & 64 Vict. c. 12, Sched. s. 122, by the Commonwealth Parliament. Norfolk Island will probably shortly be transferred; in both cases the action is taken by the Imperial Government in virtue of Imperial Statutes. In 1880 all North America not already Canadian was granted to the Dominion; for the legal authority for the act, see the Colonial Boundaries Act, 1895 (overlooked in *The Framework of Union*, p. 206).

[2] Probably also in part as a Colony by conquest or cession.

[3] Formally the power is exercised under the Foreign Jurisdiction Act, 1890. Cf., *The Government of South Africa*, i. 36, 37.

[4] This is comparable with the system by which the Governor of the Cape in Council legislates for the Transkeian territory; see *The Government of South Africa*, i. 127.

authority, and may by Proclamation make laws for the good government of each territory; provided that all such laws shall be laid before both houses of Parliament within seven days after the issue of the Proclamation, or if Parliament is not in session, within seven days after the beginning of the next session. Such laws will cease to have effect if both houses of Parliament by Resolution request the Governor-General in Council to repeal them; in which case the repeal will be carried out by Proclamation.

Moreover, his Majesty may disallow any law made by the Governor-General in Council by Proclamation for any territory within one year from the date of the Proclamation, and such disallowance on being made known by the Governor-General by Proclamation shall annul the law from the date when the disallowance is proclaimed. This procedure secures that the legislation shall not be counter to the wishes of the Parliament of South Africa, and yet at the same time secures that the Imperial Government shall have a negative voice in legislation affecting the territories. The principle is clearly a compromise, but it is one which should be satisfactory to both parties.[1]

Administration of Native Territories.—The administration of the territories is entrusted to the Prime Minister of the Union, who, however, is to be advised by a permanent Commission consisting of not fewer than three members, with a secretary to be appointed by the Governor-General in Council, who shall take the instructions of the Prime Minister in conducting all correspondence relating to the territories, and shall have under the like control custody of all official papers relating to the territories. The members, who are appointed in the same way, shall be entitled to hold office for a period of ten years, which period may be extended to successive further terms of five years. They shall be entitled to fixed salaries which cannot be reduced during their tenure of office, and they shall not be removed from office except upon addresses of both houses of Parliament. They shall not be eligible to become members of either house of Parliament. One of the members shall be appointed to be Vice-Chairman, and two members of the Commission, with the Prime Minister or his deputy, form a quorum, unless the Commission consists of four or more members, in which case three members will form a quorum; the Prime Minister or other Minister of State as his deputy, or failing him the Vice-Chairman, shall preside and shall have a casting vote in case of equality. The Commission shall advise the Prime Minister upon all matters relating to the administration of or the legislation for the territories. Any member who dissents from a decision of the majority may have the reasons for his dissent recorded in the minutes. The members shall have access to all official papers regarding the territories and may deliberate on any

[1] The concession of the power to the Imperial Government is doubtless due to the pledges under which that Government is to protect the interests of the natives in Basutoland and the Protectorates.

matter relating thereto, and advise the Prime Minister thereon. Before coming to a decision on any matter relating to the administration other than routine or of legislation for the territories, the Prime Minister must deposit the papers with the Secretary of the Commission, and a meeting of the Commission must be convened to discuss the matter. If the dispatch of some communication appears to be urgent, the Prime Minister may sanction it without submitting it to a meeting of the Commission, but he must record his reasons and give notice thereof to every member. If in any case the Prime Minister does not accept their recommendations or proposes to act contrary to their advice, he must state his views to the Commission, who will be at liberty to place on record the reasons for their recommendation or advice. The record shall then be laid by the Prime Minister before the Governor-General in Council, whose decision shall be final.[1] The Commission, however, are entitled to demand that the record of their dissent from the decision or action taken, and the reasons therefor, shall be laid before both houses of Parliament, unless in any case the Governor-General in Council expresses in a formal minute the opinion that the publication of such record and reasons would be gravely detrimental to the public interests.

These provisions therefore make the final authority of administration the Executive Government of the Union, and it seems impossible to deny that the Executive Government must inevitably in the long run be responsible for native policy, and any attempt to deprive it of such responsibility would be fatal to the efficient working of the Union. At the same time it is obviously necessary—and the fact was accepted both by the South Africa Native Affairs Commission [2] and the Natal Native Affairs Commission [3] —that permanency in native policy should be attained, and this could hardly be secured in the change of political governments. The element of continuity is secured by the appointment of this permanent Commission, which must naturally attain great influence by its knowledge and by its right of being consulted, and it may be hoped that the new experiment, when actually tried, will be more successful than any previous experiments in South Africa have been.

Hitherto attempts have been made in Natal, the Transvaal,[4] and the Orange River Colony [5] to give the Governor an independent position with regard to native matters, while the Imperial Government has retained the sole control of the Protectorates and Basutoland. It is clear that for the

[1] This appeal is from Cæsar to Cæsar, and merely allows the possibility of intervention by the Governor-General on Imperial grounds, an intervention hardly ever likely to be actually interposed, as *ex hypothesi* when the control of the Protectorates is surrendered, it will be surrendered for good in reliance on the discretion of the Union Government.

[2] Cf. Parliamentary Paper [Cd. 2399], p. 31.

[3] *Ibid.* [Cd. 3889], p. 15. The Commission here recommended a Council to advise the Governor.

[4] Letters Patent, December 6, 1906, s. 51.

[5] Letters Patent, June 5, 1907, s. 52. The powers conferred are very vague.

full development of South Africa the Protectorates and Basutoland must ultimately fall in the Union Government, and it is equally clear that fitful efforts to preserve the independent control by the Governor of native affairs cannot ultimately produce any good results.

The Native Affairs Department of Western Australia, which at one time it was proposed to keep independent of the colonial Government, was abolished in 1897, after it had worked unsatisfactorily and with much friction for seven years,[1] and it is not proposed to make any similar attempt in South Africa, as in the case of Natal the independent position of the Governor[2] has not produced any obviously satisfactory results; as a matter of fact the independence has only been nominal, as the Governor has had no staff on which he could rely to carry out any policy not approved by his Ministers.

The actual detailed administration of the Protectorates will be carried on as before by Resident Commissioners, who will be required in addition to their other duties to prepare annual estimates of revenue and expenditure and forward them to the Prime Minister, when they will be submitted to the Commission and approved of or amended by the Prime Minister, and thereupon become binding upon the Resident Commissioner by being enacted by a Proclamation by the Governor-General in Council.

Financial Provisions.—There shall be paid into the Treasury of the Union all duties of customs levied on dutiable articles imported into and consumed within the territories, and there shall be paid out of the Treasury annually towards the cost of administration in each territory a sum in respect of the duties which shall bear to the total customs revenue of the Union in respect of each financial year the same proportion as the average of the customs revenue for the three complete financial years last preceding the taking effect of the Act bore to the average of the whole customs revenue for all the Colonies and Territories included in the Union received during the same period. In case the revenue for any territory for any financial year shall be insufficient to meet the expenditure, the deficiency shall be advanced from the funds of any other territory. If this cannot be arranged, the deficiency shall be advanced by the Union Government. In case there shall be a surplus for any territory, such surplus shall in the first instance be devoted to repayment of any sums previously advanced by any territory or the Union Government to cover any deficiency in such territory, and thereafter it shall be lawful for the Governor-General in Council to lend the whole or any part of such surplus to any other territory. Subject to

[1] See Parliamentary Paper [Cd. 8350].

[2] See Clause VI. of Royal Instructions of July 20, 1893. The independent exercise of power by the Governor contemplated has not been exercised in fact; in this regard the statement in *The Government of South Africa*, i. 22, is misleading, but see *ibid.* p. 133. See also Parliamentary Paper [Cd. 3889], which assumes ministerial action, and which would place the power—as under the Union Act—in the hands of the Prime Minister.

these provisions, the revenues derived from any territory shall be expended for and on behalf of the territory in question, provided that the Governor-General in Council may make a special appropriation for defence or other general purposes of the Union, provided that the contribution shall not bear a higher proportion to the total cost of the services than that which the amount payable from the treasury of the Union towards the cost of administration of the territory bears to the total customs revenue of the Union on the average of the three immediately preceding years.[1]

Native Rights.—Further provisions are made for the security of native rights in the territories.[2] It shall not be lawful to alienate any land in Basutoland or any land forming part of the native reserves of the Bechuanaland Protectorate and Swaziland from the native tribes inhabiting the territories.

The sale of liquor to natives is to be prohibited in the territories, the rules respecting the liquor trade are to be maintained, and the Basuto custom of holding pitsos or other recognised forms of native customs shall be maintained.[3] No differential duties or imposts on the produce of the territories shall be levied, and the laws of the Union relating to customs and excise shall be made to apply to the territories.

There shall be free intercourse for the black and white inhabitants of the territories with the rest of South Africa, subject to the laws, including the Pass Laws of the Union, a qualification of considerable importance.[4]

In place of any appeal which now lies to the King in Council from any Court of the territories, the appeals are to be made to the appellate division of the Supreme Court of South Africa.

The rights of civil servants employed in the territories as existing on the date of transfer are to remain in force, while the members of the Commission shall be entitled to such pensions as the Governor-General in Council shall provide, and the salaries and pensions of the members and of other expenses of the Commission shall be borne by the respective territories in proportion to their respective revenues.

The Governor-General in Council shall annually prepare a report on the territories, which is to be laid before both houses of Parliament.[5]

These provisions, which represent the principle on which the administration of the territories is at present carried out, can be altered by an Act

[1] Cf. *The Government of South Africa*, ii. 262 *seq.*, for present financial position.

[2] The provisions follow the analogy of the Transvaal and Orange River Colony Letters Patent of December 6, 1906, and June 5, 1907, which provide for the Governors exercising the powers of Supreme Chiefs, for the non-alienation of land save by law (a much less stringent rule than now laid down), and for councils of chiefs. The rules they lay down are already law in the territories. Cf. also s. 147 of the main Act.

[3] Cf. *The Government of South Africa*, i. 138. [4] Cf. *ibid.* pp. 115, 116, 135.

[5] This is in imitation of the present reports issued by the Colonial Office. Similarly reports on Papua and on the Indians are presented to the Australian and Canadian Parliaments respectively.

of the Union Parliament, but any Bill affecting the provisions of the schedule must be reserved for the signification of his Majesty's pleasure and cannot therefore come into force without the approval of his Majesty's Government.[1]

The protection thus assured for the natives of the territories on their becoming part of the Union appears as complete as it can be made by law, and should go far to obviate any fears which may exist[2] as to any loss of native rights on the Protectorates becoming part of the South African Union. The Basuto chiefs appear to have accepted as adequate the assurances given as to their future in the Union, and in any case the transfer cannot, it is obvious, be carried out at any very early date, as no alteration in existing conditions could conveniently be made pending the coming into operation of the Union Government.

At the same time the surrender of control over the Protectorates will necessitate the definitive assumption by the Union Government of responsibility for military control, so that the Imperial garrison may be reduced to a mere guard for the naval establishment at the Cape, or be totally withdrawn. If Imperial troops are to be potentially available for maintaining order among the natives as at present,[3] the Imperial Government cannot, of course, renounce control, as it remains responsible to the Imperial Parliament.

XI. The Amendment of the Constitution.

As is natural in the case of a Constitution which is frankly not in any real sense federal, the Act does not restrict in any substantial manner the Parliament's power to alter the provisions of the Constitution. It is especially laid down in s. 152 that Parliament may by law repeal or alter any of the provisions of the Act, provided that no provision thereof for the operation of which a definite period of time is fixed shall be repealed or altered before the expiration of such period, and also provided that no repeal or alteration of the provisions of the section itself or of ss. 33 and 34 relative to the numbers of the members of the Legislative Assembly, prior to the expiration of ten years or until the total number of members of the Assembly has reached 150, whichever occurs later, or of the provisions of s. 35 relative to the qualifications of electors to the House of Assembly, or of s. 137 as to the use of languages, shall be valid, unless the Bill containing the alterations is passed at a joint sitting of the houses, and at its third reading by not less than two-thirds of the total number of

[1] This I take to be the force of s. 25 of the Schedule.

[2] See e.g. *The Empire Review*, xviii. 115.

[3] See *The Government of South Africa*, i. 100 *seq.* As long as the Imperial forces are stationed in any inland part of South Africa it is idle to deny that they are potentially used to prevent or restrict native rebellion, for in case of disaster to the colonial militia they would be and must be so used.

members of both houses. The section is well worded, as it obviates the possible evasion of its spirit by the alteration of the section itself. For example, the Queensland Constitution Act of 1867 intended to provide a safeguard against the alteration of the composition of the Legislative Council by providing that any Act relative to it required to be passed by a two-thirds majority, but it omitted to provide that the clause itself should only be altered by a two-thirds majority, so that in 1908 the Government had no difficulty in effecting their purpose by repealing by ordinary majorities the offending clause [1] and so dealing with the matter by ordinary majorities. On the other hand, the provisions of the Commonwealth Constitution for the amendment of the Constitution require the assent of the States affected to such alterations as affect the proportionate representation of the State in either house or its limits, etc., or in any manner affect the provisions of the Constitution in relation thereto, and thus the provision for amendment itself can only be amended out of existence with the consent of the State in question.

The only other provision affecting the amendment of the Constitution in the first draft was that contained in the schedule which forbids amendment of the schedule unless the Bill for amending it be reserved. The position was thus in strong contrast with the condition of affairs either in Canada or in Australia.

In the case of Canada the constitution is regarded as not being liable to alteration except in a certain number of minor points, under which power of alteration is expressly given by the British North America Act, 1867, save by an Act of the Imperial Parliament itself. The reason for this is, as was recognised in 1907,[2] when the question of the alteration of the subsidies payable to the Provinces was under consideration, that the Act of 1867 is of the nature of a quasi treaty between the Provinces which then joined, and this provision should therefore only be modified by an external authority, and not by an authority like the Federal Parliament created by the Act itself. It does not appear that there is any desire in Canada to alter the position in this regard, which must be considered as a satisfactory safeguard for provincial interests against any possible encroachment by the Federal Government.

In the Commonwealth [3] the desire for immunity from external interference has led to a curious compromise; the Act can indeed be altered by the Federal Parliament, but only with the assent of the people of the

[1] Act No. 2 of 1908. The Act was protested against on this ground in the Legislative Council. But exactly similar circumstances occurred in 1857 in New South Wales.

[2] See Colonial Office letter, June 5, 1907, printed in British Columbia Sessional Papers, 1908, C. 1. The suggestion in *The Framework of Union*, p. 196, as to the Parliament's power of alteration is untenable.

[3] 63 & 64 Vict. c. 12, Sched. s. 128. The idea that the Imperial Parliament has given up its own power of alteration is, of course, untenable (cf. *ibid.* p. 197; B. Holland, *Imperium et Libertas*, p. 184).

Commonwealth, and the provisions laid down that any proposed law for the alteration of the Commonwealth must be passed by an absolute majority of each house of Parliament and must be submitted in each State to the electors not less than two nor more than six months after its passage through both houses. If in a majority of States a majority of electors voting approved the proposed law, and if a majority of all the electors voting also approved the proposed law, it would then be presented to the Governor-General for the Royal assent. Some laws, however, require still further approval than this. No alteration diminishing the proportionate representation of any State in either house of Parliament, or the minimum number of representatives of a State in the house of Representatives, nor any clause diminishing or altering the limits of a State, or in any manner affecting the provisions of the Constitution in relation to the State, shall be allowed, unless the majority of the electors in the State voting under the Act approve the proposed law.

In the case of a deadlock between the two houses on a proposed constitutional alteration, if the house[1] which has passed the Bill passes it again after an interval of three months in the same or the next session, and the other house again rejects it, the Governor-General may submit the law to the voters in the States, when the procedure is the same as if the law had been passed by both houses with the requisite majority.

The ordinary procedure has already been adopted in one case in 1907,[2] when by an Act other provision was made for the date of election of senators; on that occasion the requisite majorities were obtained in every State without difficulty. But to carry any substantial alteration in this elaborate procedure would probably be a matter of considerable trouble.

In the case of the Union, as no real attempt is made at a federation, there would appear to be no objection to the power of simple alteration, which is in keeping with the existing practice, in the Colonies of South Africa. In Natal and the Cape[3] constitutional alterations need no special form of legislation whatever, and the only requirement in the case of the Transvaal and the Orange River Colony[4] is that the Bills for such alterations must by law be reserved. The only need for special provision arises, therefore, from the desire to make certain parts of the Constitution especially sacred, such as the representation of the Provinces in the Assembly, the use of the Dutch language, and the Cape native vote. The equal representation of the Provinces in the Senate is not subjected to provincial control.

[1] That either house can force a referendum with the Government's consent is noteworthy. Deadlock provisions in ordinary legislation give the power only to the lower house.

[2] Commonwealth Act No. 1 of 1907.

[3] Cf. *The Government of South Africa*, i. 444, 448, 449 (on pp. 443, 451, the case of Newfoundland is overlooked).

[4] *Ibid.* p. 452. The theory there and elsewhere expressed that the legislature cannot amend the Letters Patent constituting the office of Governor is quite erroneous.

Further, of course, the restriction imposed on the Transvaal and Orange River Colony legislatures as to legislation affecting differentially natives or allowing the immigration of indentured coloured labour and the temporary withdrawal from their power of land settlement must disappear with Union. It should, however, be noted that the Imperial Government thus surrenders a good deal, for the legislation of the Provinces will be wholly removed from its direct control.

While, however, the first convention was prepared to leave the amendment of the Constitution to Parliament subject only to the slight restraints above enumerated, the Bloemfontein Conference resulted in the adoption of a clause (s. 64) providing for the reservation of any Act altering the provisions of the Constitution (ss. 32-50) relating to the composition and powers of the House of Assembly, and of any Act abolishing Provincial Councils or abridging their powers. This alteration was in the main due to two causes. In the first place the supporters of the principle of "one vote one value" were determined after their efforts to rescue the principle from the onslaught of the Cape Parliament, which suggested a statutory preference of 15 per cent. in favour of sparsely populated districts,[1] to do all that was possible to safeguard absolutely their principle, and so adopted the requirement of reservation. In the second place the Natal delegates were desirous of securing the position of the Provincial Councils as far as practicable and therefore provided for the stereotyping of the existing arrangements by requiring the reservation of any Bill altering them. Even so the possibility of altering the Constitution remains very great, and the Union Parliament is really in a stronger position than any Parliament save probably that of New Zealand and that of Newfoundland, which of course are simple unified Colonies with no complicated questions of two races of equal civilisation and equal resources.

[1] The principle of proportional representation was sacrificed as far as concerned the lower house of the Union Parliament in order to secure the retention of that of equal electorates. There were, however, strong practical objections to it: see Sir H. de Villiers' speech at Bloemfontein on May 11 (*Cape Times*, May 12, 1909).

FRENCH LAW WITHIN THE BRITISH EMPIRE.[1]

I. HISTORICAL INTRODUCTION. THE FIELD OF ITS OPERATION.

[*Contributed by* Mr. Justice Wood Renton, *of the Supreme Court of Ceylon.*]

My aim in these lectures—which, I am sorry to say, have had to be prepared under pressure of other duties at the close of furlough—will be to indicate, as clearly and as accurately as I can, the extent to which French law has been introduced by direct incorporation into, or has exercised an indirect historical influence upon, the various systems of law that are to be found at this day within the limits of the British Empire. It is impossible, and, for a reason to be mentioned presently, it is unnecessary for me to say much as to the general course of the development that the law of France pursued down to the enactment of the Napoleonic Codes, with which its activities as a source of law within the British Empire came to an end. Time fails for such a retrospect; and the ground has already been covered by writers with whose work you are all familiar. It may suffice to refer for a detailed account of this important episode in legal history to M. Viollet's *Histoire du droit civil français*; to the chapter on "French Law in the Age of the Revolution" which the same learned jurist has contributed to vol. viii. of *The Cambridge Modern History*;[2] to the chapter on "Common Law and Statute Law" in Sir Courtenay Ilbert's *Legislative Methods and Forms*;[3] and to the paper on "The Centenary of the French Civil Code" read by him before the British Academy in December 1904, and reprinted in vol. vi. of the *Journal of Comparative Legislation*.[4]

We all know how France came to be divided for juridical purposes into two great tracts of territory: the *pays du droit coutumier* in the north, where various, and to some extent conflicting, bodies of customary law—the most important of which were the Customs of Normandy, of Paris, and of Orleans—prevailed; and the *pays du droit écrit* in the south, where the civil law, modified by so-called "barbarian" usages, was in force. I am not sure that the confusion and uncertainty which the existence of

[1] A series of lectures delivered before University College, London, on May 17, 24, and 31, 1909. [2] Pp. 710-53. [3] P. 8. [4] Pp. 218-31.

these different systems of jurisprudence created, and which Voltaire has immortalised in the saying that the traveller in France changed laws as often as he changed post-horses, have not been exaggerated. In the *pays du droit coutumier* the civil law was resorted to where custom was silent. In the *pays du droit écrit* barbaric usage had, as I have said, modified the law of Rome; and as time went on, the influence of custom made itself increasingly felt even in the region of the written law. And the customs themselves did not contain complete and mutually exclusive bodies of law. A great part of the law, including that of obligations, was the same, I believe, for the entire kingdom. So there were elements that made for unity, if there were also manifold and serious divergences, and long before the era of the French Revolution the work of unification had begun. One law for the whole kingdom of France was a maxim in the policy of Louis XI. The principal customs of the country were gradually reduced into writing from the time of Charles VII. onwards. The royal power of legislation by Ordinance was used for the practical codification of large branches of law, as in the Ordinances of Colbert and D'Aguesseau, which are, in point both of time and of material, true precursors of the Napoleonic Codes. Every corner in the wide field of French jurisprudence was covered by the labours of commentators, culminating in the splendid work of Pothier. And then, when the harvest was ready, the authors of the Codes came down and reaped it.

Of the part that French law has played, and is playing, in the history of other lands unconnected with the British Empire, or, as is the case with Egypt, connected with it only by peculiar ties of an international character, I cannot speak now. Into the jurisprudence of the Empire it has entered by different avenues and in several different forms. When King John lost his continental possessions, the Custom of Normandy survived in the Channel Islands, the only fragments of the old duchy that he succeeded in retaining or recovering. When the hostile designs of the Angevin and Plantagenet kings at once against Scotland and against France drove those two nations into close political and social relationship, the law of France came to exert a moulding influence on that of Scotland. The last points of contact between French and British Imperial law form part of the story which Professor Seeley, Sir Charles Lucas, and the authors of the "Rulers of India" Series have told so well, of the long, dispersed, and world-wide struggle between France and England several centuries later, sometimes with equal foresight of the issues, sometimes with equal absent-mindedness, sometimes with gifts, sometimes with only death or disgrace, in store for their great proconsuls at the scene of action—for the Crown of Indian and Colonial Empire. It is a story of which both the brave nations who supplied the materials for it have, in the main, reason to be proud; and the honours were not undivided at the last. If the dreams of Lally and Dupleix, of Montcalm and Labourdonnais, failed of

realisation, the close of the struggle left the law and, to a large extent, the language of France firmly established in Quebec, in St. Lucia, and in Mauritius and its dependencies.

In the present lecture I propose to say something of the circumstances and the forms under which this reception (if I may use that expression) of French law into the British Empire took place, leaving for the second and concluding lectures of the course the question of the extent to which that law has been maintained and departed from.

I begin with the Channel Islands, which, forming part originally of the duchy of Normandy, descended, with the duchy, to William the Conqueror, passed on his death to his eldest son Robert, while William Rufus succeeded to the Crown of England, and were re-united, with Normandy, to England by Henry I.[1] In the reign of John (about 1205), the continental part of the duchy revolted from English rule, and was taken from England by Philip Augustus. Whether the Channel Islanders joined in this revolt is a disputed point. But, in any case, John recovered or retained his hold upon them; and they have ever since, in the language of Hale,[2] been "enjoyed by the Crown of England, though they are still governed under their ancient Norman laws." The constitutional position of the Channel Islands was thus defined by Coke as far back as 1608:[3] "Those isles are no parcel of the realm of England, but several dominions enjoyed by several titles, governed by several laws"; but under the Interpretation Act, 1889,[4] the expression "British Islands" includes them, for the purposes of that Act and of every Act passed after its commencement, unless the contrary intention appears. In their relations with England, the States of Jersey[5]—for no similar claim has been put forward on behalf of Guernsey[6]—have made effective use by way of analogy of a weapon which itself indicates the French origin of their constitutional law, and which is suggestive of the historic claim of the French Parliaments to criticise the royal Ordinances, and, if they thought proper, to refuse to confer upon them the seal of registration, which, as these measures were based on the royal prerogative, was indispensable to their validity. But I cannot discuss that aspect of the constitutional law of Jersey here.

The common law of the Channel Islands is based on the ancient customary law of Normandy, theoretically as it existed at the time of the loss by King John of the continental part of that duchy. But, in fact, while the principal authority on that law—*Le Grand Coustumier du pays et Duché de Normandie*—is a statement in the main of law in force in

[1] Forsyth's *Cases and Opinions on Constitutional Law*, p. 391.

[2] *Hist. Com. Law of Eng.*, p. 147.

[3] *Calvin's Case*, (1608) 7 Co. Rep. 21 r.

[4] 52 & 53 Vict. c. 63, s. 18(1).

[5] See Anson, *Law of Const.*; Report of Jersey Comm., p. v.; *In re the States of Jersey*, (1853) 9 Moo. P.C. 185; 8 St. Tri. N.S. 285; *In re Daniel*, (1891) 8 St. Tri. N.S. at p. 314.

[6] See Burge, 2nd ed. vol. i. p. 140.

Normandy prior to the separation, one of the principal commentaries on the customary law of Normandy in use in Jersey (I refer to that of Terrien) was published long after the final separation of the duchy from England, and contains a considerable body of law which was grafted into the Norman institution posterior to it. The Privy Council, however,[1] have declared Terrien to be "the best evidence of the old Custom of Normandy, and also of the Channel Islands before the separation of Normandy from the English Crown"—a view based on the fact that it was published some years before that custom was "reformed" at the instance of Henry III. of France. This reformed custom and the Customs of Orleans and Paris[2] have not the force of law in Jersey, but may legitimately be referred to as *ratio scripta*.

In Guernsey, the *Grand Coustumier* has never been so fully received as law as in Jersey; and the principal authorities on the customary law are the *Approbation des Loix*, a commentary on Terrien, confirmed by an Order in Council of October 27, 1581, and the *Précepte d'Assise*, framed in all probability by the Royal Court, and embodying a statement of what the inhabitants considered at an early period to be their customs and privileges. No judicial precedents are extant in Jersey prior to 1503, in which year all the public records are said to have been consumed by fire; but a regular series commences about twenty years later. Since 1885, a current index to the decisions of the Royal Court of Jersey has been published; but in Guernsey the rulings of the Court exist only in manuscript.

The next, and certainly one of the most interesting and as yet imperfectly investigated, of the points of contact between French and British law is to be found in the law of Scotland. It was brought about, as I have already said, by the common antagonism of France and Scotland to England in the time of the Angevin and Plantagenet kings, and it has been dignified by the name of *La Ligue Ancienne*. There can be no doubt but that this Ancient League, which still happily survives, purified of any admixture of anti-English feeling, in the Franco-Scottish Society, has influenced Scottish life and character profoundly. Its political and social aspects are outlined in Dr. Hill Burton's *Scot Abroad*, in M. Francisque Michel's *Les Écossais en France: les Français en Écosse*, and in M. Teulet's invaluable *Relations politiques de la France et de l'Espagne avec l'Écosse au XVI^me^ Siècle*.

The early chroniclers envelop its origin in a halo of romance.[3] They tell us that Charlemagne, whether from hostility to the Saxons or desirous of attracting Scotsmen to his Court, proposed an offensive and defensive alliance to King Achaius. The debate on this proposal before the Council

[1] See *La Cloche* v. *La Cloche*, (1870) L.R. 3 P.C. at p. 136.

[2] *La Cloche* v. *La Cloche*, ubi. sup. at p. 138; *Falle* v. *Godfray*, (1888) 14 A.C. at p. 76.

[3] See Chambre, *Histoire abbrégée de tous les roys de France, Angleterre, et Écosse*, 1579.

of the Scottish King is recorded with Homeric minuteness. Against the alliance it was urged by Calmanus that England was the neighbour, and therefore the natural ally of Scotland, that her vengeance would be swift and sure if France proved faithless or weak, that her naval power was too strong to be defied, and her commercial favour too lucrative to be thrown lightly away. To these arguments Albanus replied that the past behaviour of England towards Scotland (*la coustume des Anglois*) had been far from neighbourly, and that the Scots were well able to protect themselves, nor would God leave them unbefriended. The opinion of Albanus prevailed, and an alliance of perpetual amity and mutual defence against English aggression was concluded. It is not, however, till the thirteenth century that the student of the history of the Ancient League feels that he is on firm ground. It was formally renewed between Alexander II. of Scotland and Philip Augustus at Boulogne in 1216, and, in the three and a half centuries that followed, it was revived as often as the ambitious designs of England on French and Scottish independence assumed a practical form.

How far the Ancient League moulded the form of Scots law is a question somewhat difficult to determine, because of the rival influence that Holland had come to exert on the life of Scotland at the time when the great Scottish institutional treatises were written. But this much is clear. In its earliest structure, Scots law approximated closely to that of England. "When one dives," says Lord Kames,[1] "into the antiquities of this island, it will appear that we borrowed all our laws and customs from the English. No sooner is a statute enacted in England, but upon the first opportunity it is introduced into Scotland: and accordingly our oldest statutes are mere copies of theirs. Let the Magna Charta be put into the hands of any Scotchman ignorant of its history, and he will have no doubt that he is reading a collection of Scots statutes and regulations." In the course, however, of the period during which the Ancient League subsisted, there was a change. The law of Scotland became assimilated to that of Rome. As a palmary instance of this process, I may refer to the transition between the fourteenth century and the time of Bankton, from the English prohibition of legitimation *per subsequens matrimonium* (a prohibition reproduced in the *Regiam Majestatem*, which, whatever, may be thought of its authenticity, may still, I suppose, be looked at as an exposition of Scottish customary law) to the recognition of that doctrine in conformity with the laws of Rome, France, and Holland.

To apportion the respective shares of France and Holland in the transmutation of the character of Scots law, of which the doctrine of legitimation *per subsequens matrimonium* is only one instance,[2] is a task that I do not feel competent to attempt. But that France did bear an important part in the reception of the Roman law into Scotland is, I think, incontestable. For the influence of France on the legal life of Scotland can

[1] *Essays*, i.

[2] See further, Pollock and Maitland, i. 123, 202.

be clearly traced. The terminology, past and present, of Scots law is infiltrated with it. A bankrupt is a dyvour (*devoir*); advocate (*avocat*) and procurator (*procureur*) are the equivalents of barrister and solicitor; a successful defendant is assoilzied (*absoillé*); to "compryse" (*comprendre*) is to attach for debt; the right to decline trial by a particular judge is "declinature" (*déclinatoire*); a man's property or means is his "valiant" (*vaillant*); to bribe is to "creish" (*graisser la palme*). Moreover, when in 1532 King James V. determined to "establish a permanent order of Justice" in Scotland, it was the Parliament of Paris that he took as his principal model. The name "Court of Session" which the Supreme Civil Court of Scotland bore, and bears, was indeed derived from earlier tribunals —the Session of James I. and the Daily Council of James IV.; and the term "College" in the title "College of Justice"—assigned to it when used as a collective description of the tribunal itself and all those associated with it in the administration of justice—is probably of Papal origin.[1] But alike in its constitution, in its powers, in the privileges of its members, and in the procedure before it, the Court of Session was a reproduction of the famous French Parliament in miniature. The principal points of resemblance between them may be summarised thus: In both, the sessions of the Supreme Court of Judicature were definitely fixed in the capital of the kingdom—by an Ordinance of Philip le Bel in 1302 in the case of the Parliament of Paris; by the Act of Institution in that of the Court of Session. In both, the ordinary judges were divided between the laity and the clergy; the peerage had an independent representation, with this difference, however, that the "extraordinary lords" of the Court of Session were nominated by the Crown, whereas the French peers sat in the Parliament of Paris as of right. In both, the judges were exempt from tithes, exactions, and public burdens of every kind; ordinary judges were examined before their admission;[2] appeals were prohibited;[3] proof of facts—a practice that survived in Scotland till 1800—was taken not as in England before a jury, but before certain judges who thereafter transmitted their notes to the whole Court; minor analogies are presented by the exclusion of the public from the proceedings both of the Parliament and of the

[1] See Mackay, *Practice of the Court of Session*, i. 22.

[2] To this day an ordinary judge of the Court of Session has to undergo his "trials," *i.e.* to show his fitness for office by deciding a case set to him as a test—a stage at which he is styled a Lord Probationer—before he is admitted to the Bench; and under the Act of Union, 1706, c. 7, s. 19, no Writer to the Signet is eligible for the office of Lord of Session unless two years before his appointment he has passed an examination in civil law before the Faculty of Advocates. It has frequently been said that no Writer to the Signet has been promoted to the Scotch Bench since the Union. But this appears to be wrong. Hamilton of Pencaitland, nominated as a Lord of Session in 1712, was a Writer to the Signet.

[3] The right of appeal from the Court of Session to Parliament was not established till 1689. Mackay, *Practice*, i. 216. As to the Parliament of Paris, see Bernardi, *Hist. de lég. fran.* 343.

College of Justice, and by the Scotch Act of Sederunt, which has some resemblance to the French *arrêt par voie de règlement pour tous les cas à venir*. In both the College of Justice and the Parliament of Paris, a quorum of ten judges was originally necessary for all decrees. "Finally, what was of most permanent consequence"—I am quoting from Sheriff Mackay's *Practice of the Court of Session*—was, in the case of both, "the recognition of the civil and canon laws as being, where there were no established customs, a subsidiary common law for the realm."

The Ancient League between France and Scotland was never closer than in the early part of the reign of James V.; there were no fewer than five embassies from France to Scotland between 1515 and 1525. In 1523, the Regent Albany was admitted to a seat in the Parliament of Paris as a prince of the blood royal; and on December 31, 1536, James V. himself was received in State by the Parliament of Paris, on the occasion of his marriage with the Princess Magdalene.

I pass now to French law in Canada, in St. Lucia, and in Mauritius and its dependency Seychelles.

The Province of Quebec, says M. Mignault,[1] is the eldest daughter of old France, is above all the daughter of "La France coutumière." The first French settlement in Quebec was established in 1608 by Champlain, who formed a Company of merchants to secure the trade of the St. Lawrence. This body was, however, divided against itself, and against rival monopolists, to whom subsequent grants were made, by religious differences and trade jealousies; and accordingly, in 1627, "all former privileges were annulled, and the control of Canada passed into the hands of a new strong company, known as the One Hundred Associates,"[2] with Cardinal Richelieu at its head. In 1629, Quebec was wrested from France by the English freebooter Kirke; but at the date of its capture, the Convention of Susa had already been signed, and three years later (March 29, 1632) the Treaty of St. Germain-en-Laye definitely restored the prize to France. In 1663 the One Hundred Associates surrendered their charter to the French King, and, like other French Crown Colonies, Quebec was administered by a Governor, an Intendant, and a Superior or Sovereign Council, created by royal edict in April 1663. In February 1763, by the Treaty of Paris, it was ceded to England. The law then in force consisted of (1) the Custom of Paris and the Ordinances prevailing within the jurisdiction of Paris, except such as were clearly not intended to have effect outside France;[3] (2) the arrêts of the Conseil du Roi and the Ordinances published between 1663

[1] *Le Code Civil, 1804-1904: Livre du Centenaire*, p. 725.

[2] Lucas, *Hist. Geog.* v. p. 70.

[3] The edict of Louis XIV. in April 1663, creating the Sovereign Council of Quebec, conferred on it jurisdiction "pour juger souverainement et en dernier ressort selon les lois et ordonnances de notre royaume, et y procédés autant qu'il se pourra en la forme et manière qui se pratique et garde dans le ressort de notre cour du Parlement de Paris."

and 1763, but in both cases only if these had been registered by the Council of Quebec;[1] (3) the Ordinances of the administrative authorities in Canada, particularly those of the Intendants, who presided at the Council and were invested with legislative authority; (4) the judgments of the Court.

As Quebec was a Colony acquired by conquest or cession, this body of existing jurisprudence, by a well-settled principle of constitutional law, would remain in force, *mutatis mutandis*, unless and until it was abrogated by the new governing power. For some time its fate was doubtful. In the case of Quebec, the Articles of Capitulation (September 18, 1759)[2] contain no reference to the subject by way either of acceptance or of demand. In the case of Montreal, a year later, Art. 42 of the Articles of Capitulation[3] demanded that "the French and Canadians shall continue to be governed by the Custom of Paris, and the laws and usages established" for the Colony under the French *régime*. But this demand elicited only the cautious response that they would become the subjects of the King. The Treaty of Paris[4] contained no provision for the preservation of the French law in Canada, and a Royal Proclamation[5] of October 7, 1763, disclosed an intention on the part of the Crown to introduce into the Colony the laws of England. The Commission[6] to Governor Murray directed him, with the advice and assent of the Council, and the Assembly created for the new Colony, to enact "laws, statutes, and ordinances . . . as near as may be agreeable to the laws and statutes" of the kingdom of Great Britain. In pursuance of these instructions an Ordinance[7] was passed on September 17, 1764, establishing Civil Courts—English in name—a Court of King's Bench with exclusive criminal and superior civil jurisdiction, with authority to hear and determine cases agreeably to the laws of England; and a Court of Common Pleas, an inferior Court of Judicature, intended for Canadian suitors until they had acquired some knowledge of English law. In this latter Court, all trials were to be by juries, to which Canadians were to be admitted, and the judges were to determine cases agreeably to equity, "having regard nevertheless to the laws of England as far as the circumstances and present situation of things will admit, until such time as proper Ordinances for the information of the people can be established by the Governor and Council, agreeable to the laws of England." A significant clause followed: "The French laws and customs to be allowed and admitted in all causes . . . (between natives) where the cause of action arose before October 1, 1764."

[1] See *Hutchinson* v. *Gillespie*, (1844) 4 Moo. P.C. 378; *Les Sœurs dames Hospitalières de St. Joseph de l'Hôtel-dieu de Montreal* v. *Middlemiss*, (1878) 3 A.C. 1102, 1119; *Symes* v. *Cuvillier*, (1880) 5 A.C. 138.

[2] See *Canadian Archives: Documents relating to the Const. Hist. of Canada, 1759-91*, (Shortt and Doughty, 1907).

[3] *Ibid.* p. 8.

[4] Art. 4: Shortt and Doughty, p. 73.

[5] *Ibid.* p. 119.

[6] Art. 50: Shortt and Doughty, p. 142.

[7] *Ibid.* pp. 149, 150.

Strangely enough, the attention of the new French Canadian subjects of the Crown seems not at first to have been directed to the effect of this legislation on their ancient law. The petitions and counter-petitions which poured into the hands of Governor Murray concern themselves chiefly with the details of the Ordinance of September 17, 1764, and with the inclusion of Canadian jurors in the juridical system that it established. There is some evidence, indeed, that the French Canadians may not have been unwilling to leave matters in a state of uncertainty for a time in order to avail themselves of either French or English jurisprudence, as best suited their purpose at the moment. In a *Plan of a Code of Laws for the Province of Quebec*, reported by the Advocate-General Marriott in 1774, I find a curious case that illustrates this tendency. A British settler named Grant purchased the estate of a Mr. St. Ange, who was a French Canadian, and, after an inspection of the property, paid part of the price. A further acquaintance with his purchase convinced Mr. Grant, however, that it was worth less than half what he had paid for it. He declined to fulfil his share of the bargain, and when he was sued for the purchase money, claimed a *restitutio in integrum* under the French civil law. But Mr. St. Ange was equal to the occasion. He promptly invoked the assistance of the law of England, and, in view of the buyer's inspection of the estate before the purchase, insisted on the applicability of the maxim of English equity, *vigilantibus non dormientibus succurrit lex.*

But in time the question of the maintenance of the old French law in Quebec seems to have aroused uneasiness in the Colony, and towards the end of 1764 an additional instruction [1] was sent to Murray, explaining that the Proclamation of October 7, 1763, was not intended to take away from the native inhabitants the benefit of their own laws and customs in cases where titles to land and the modes of descent, alienation, and settlement are in question. In pursuance of this policy and notwithstanding the alteration of the law by the Ordinance of 1764, lands appear to have been left to be divided as formerly, and the estates of intestates were still distributed according to French law. In 1765 all the memorials and petitions on the subject were referred to the law officers of the day—the Attorney-General Yorke and the Solicitor-General de Grey—who in a luminous report, now published in full in Messrs. Shortt and Doughty's edition of the *Canadian Archives*,[2] advised that in all personal actions founded upon contract or tort the substantial maxims of law, which are everywhere the same, should be followed, while in suits or actions relating to title to land, and generally where questions of real property were concerned, the local customs and usages should prevail. "It is the more material," say the law officers, "that this policy should be pursued in Canada; because it is a great and ancient Colony, long settled and much cultivated by French subjects." In 1767 legislative effect was given to the latter part of these

[1] Shortt and Doughty, p. 163, *n.* 1.

[2] Pp. 174-8.

recommendations; and in 1774, after a period of controversy on the subject between Massères, the Attorney-General of Quebec, and Governor Carleton, who had succeeded Murray first as Lieutenant-Governor in 1766, and then as Governor in 1768, the Act of Quebec[1] provided that in all matters of controversy relative to property and civil rights resort should be had to the laws of Canada as the rule of decision. This provision was not to apply, however, to lands already or thereafter granted by the Crown in "free and common socage"; liberty was given to leave property by will in either the French or the English form; the English criminal law, which had since 1763[2] been, uniformly and with general acceptance, administered throughout the Province, was to remain in force; and in 1785 a statute of the Province[3] provided that in commercial matters the English rules of evidence should be followed.

There is a considerable body of authority as to what the French laws in force in Quebec at this period were. At the desire of Governor Carleton, "a Select Committee of Canadian gentlemen"—I am quoting from the title-pages of their works—"well skilled in the laws of France," prepared in 1772 successive abstracts "of those parts of the Viscounty and Provostship of Paris," and also of the criminal laws and French laws of police, "which were received and practised in the Province of Quebec at the time of the French government"; and a similar abstract was in the same year made by Cugnet of the royal edicts and declarations that had been introduced into Quebec by registration. But it appears[4] that even then French lawyers were not agreed as to how far the Custom of Paris was in force, and we know that the question as to what edicts and declarations had been registered has given rise to frequent controversy in the Privy Council since that date.

In 1791, by the Constitutional Act of that year,[5] the old Province of Quebec was divided into the Province of Upper Canada and the Province of Lower Canada. The first Act of the Provincial Parliament of Upper Canada—passed on October 15, 1792[6]—adopted the laws of England relative to property and civil rights in force on that date. In 1840, by the Union Act,[7] the Provinces of Upper and Lower Canada were again united as the Province of Canada. But the French law in Quebec remained undisturbed.[8] The Federation Act of 1867[9] severed the two Provinces once more. The Province of Upper Canada became that of Ontario. The Province of Lower Canada became that of Quebec. In that Province it is that, by virtue of s. 129 of the Act of 1867, which provided that all laws in force in Canada at the date of the Union should, subject to repeal or alteration by proper legislative authority, continue as if the Union

[1] 14 Geo. III. c. 83. [2] *Reg.* v. *Coote*, (1873) L.R. 4 P.C. 599.
[3] 25 Geo. III. c. 2, s. 10.
[4] See Marriott's *Plan of a Code of Laws for the Province of Quebec*, 1774.
[5] 31 Geo. III. c. 31. [6] 32 Geo. III. c. 1. [7] 3 & 4 Vict. c. 35.
[8] The law of property from 1774 to 1867 in Quebec is the Coutume of Paris, unless a case can be shown to fall under some contrary law: *Exchange Bank of Canada* v. *Reg.*, (1886) 11 A.C. 157. [9] 30 & 31 Vict. c. 3.

had not been made, French law still exists—no longer, however, as the Custom of Paris, or the arrêts and Ordinances of the French kings and their intendants, but in the Civil Code of Quebec, which came into force on August 1, 1866, and abrogated as from that date[1] all the old law wherever it was inconsistent with the provisions of the Code or dealt with matters for which the Code provided. In my second and third lectures I will endeavour to indicate some of the main points in regard to which the Civil Code of Quebec has respectively adhered to and departed from the old law of France, making free use, for this purpose, of the admirable Reports of the Canadian Commissioners. In the meantime I conclude, so far as Canada is concerned, this historical survey by mentioning the enactment of the companion Code of Civil Procedure for Quebec, the first edition of which came into operation on June 28, 1867, and of which a revised edition was brought into force on September 1, 1897.[2]

Although it is said[3] that in St. Vincent some old French arrêts still exist, it is mainly in St. Lucia among the West Indian Islands that a law based on the law of France is now in force; for in Grenada—which, by the way, was under French influence as strongly as St. Vincent—English law was definitely introduced by Royal Proclamations on December 19, 1764, and January 10, 1784. St. Lucia was one of the most fiercely contested prizes in the struggle between France and England for Colonial Empire. The French claimed it by virtue of length of occupation, under the edict of March 1642, which gave it, with the other possessions of the kings of France in America, to the West India Company. The English title to it was based on a settlement of 1639.[4] On the dissolution of the West India Company, it was re-annexed to the Crown and became a dependency of Martinique; and in the middle of the eighteenth century justice was administered in St. Lucia by the Court of Sénéchaussée, presided over by the Sénéchal, and exercising criminal jurisdiction subject to an appeal to the head of the local executive, and civil jurisdiction with an appeal to the Conseil Supérieur at Martinique. After earlier vicissitudes, St. Lucia capitulated to England in 1762. The Treaty of Paris restored it to France in 1763. In 1778 England again wrested it from French hands. The Treaty of Versailles again surrendered it to France. In 1794 the island was once more captured by the English. It was partially retaken by the French under Victor Hugues in 1795, but was recovered by England in 1796, and was held by them till the Peace of Amiens, then restored to the French, again taken by the English in 1803, and finally ceded to England by the Treaty of Paris in 1814. From the legal point of view, the important dates, so far, in the history

[1] See Art. 2613. [2] By a Proclamation following on the Quebec Act, 60 Vict. c. 48.

[3] See Ilbert, *Legislative Methods and Forms*, p. 169.

[4] See Breen's *St. Lucia*, 1844; and *Mémoires des Commissaires Anglois et François sur l'Isle de St. Lucie*, 1755.

of St. Lucia are 1681, 1803, and 1814. In 1681, a date at which the island was in the hands of France, an arrêt[1] of the Conseil Supérieur of Martinique, of which it was then a dependency, extended to it the custom of Paris, as embodied in the *procès-verbal* of February 22, 1580, and the Royal Ordinances of April 1667, August 1669, August 1670, and March 1673. To these must be added the laws of Martinique applicable to the dependencies, and particularly the *Code noir*, which regulated the status, the labour, and the punishment of slaves. In 1803 a Proclamation of June 23,[2] issued by General Grenfield and Rear-Admiral Hood a few days after the final capture of the island by the English, secured to the inhabitants provisionally the enjoyment of their property under the protection of the laws existing immediately anterior to the last cession.

In 1814 St. Lucia was ceded in full right and sovereignty by the Treaty of Paris to the British Crown. If these words, "the last cession," are to be—as I suppose they must be—interpreted as referring to the cession of St. Lucia to England in 1796, we shall reach, at first sight, a conclusion which modifies to some extent the familiar view that the continuance of the old French law in St. Lucia was guaranteed by General Grenfield's Proclamation. For in the Capitulation of May 25, 1796, the demand of the capitulating garrison that "property and persons of every description shall be placed under the protection of the laws" was met by the reply that they would be subject to and under the protection of the English laws. If we construe these provisions literally, it would follow that the law which General Grenfield provisionally undertook to maintain was the law of England and not the law of France! As we find, however, that no attempt was made under the Capitulation of 1796 to introduce English law into the Colony, it seems more reasonable to conclude either that the reference to English law only meant the law as administered by England, or, in any event, that any intention to substitute English for French law that may have existed was abandoned.[3] So far, however, as I have been able to discover, there was not, in the case of St. Lucia, any subsequent confirmation of the provisional undertaking of General Grenfield and Rear-Admiral Hood, even assuming that that undertaking related to the old law. If I am right on this point, the maintenance of the French law in St. Lucia would depend on the arrêt of 1681 and the doctrine that the law of a conquered or ceded Colony remains in force till it is duly altered by the new governing authority. As in the other French Colonies, only those of the Royal Ordinances that had been applied there by registration are in force.[4]

The Courts of St. Lucia were reorganised by Order in Council in 1831 (June 20, 1831), and some time afterwards a scheme for the consolidation and amendment of the laws of the Colony was proposed by Mr. Musson,

[1] See Rev. Laws of St. Lucia, 1889, p. 1. [2] *Ibid.* p. 4.

[3] MS. Report of Armstrong C.J. to the Administrator Des Vœux, January 14, 1876. See *Du Boulay* v. *Du Boulay*, (1869) L.R. 2 P.C. 430.

then Chief Justice, and accepted by the Governor and Council. It was, however, rejected by the Secretary of State; and Mr. Breen, in his interesting book on St. Lucia, which was published in 1844, speaks of the proposal as if it had been inspired by lunacy. The task was, however, accomplished later on. By 1876, Mr. (afterwards Sir) George William Des Vœux, Administrator of the Government of St. Lucia, and Mr. James Armstrong, Chief Justice, had prepared a Civil Code[1] for the island "upon the principles of the ancient law," with such modifications as circumstances appeared to require. In 1877 an Ordinance was passed directing this Code to be printed, appointing commissioners to report upon it, and providing for its adoption as the law of the Colony. It was in fact brought into operation by a proclamation of August 18, 1879,[2] as on and from October 20 following. A Code of Civil Procedure prepared by Chief Justice Armstrong was enacted in 1882.[3] These Codes[4] abrogate the old law, so far as it was inconsistent with them or covered ground with which they dealt expressly. Later legislation has provided St. Lucia with a Criminal Code[5] in which the general principles of English criminal law are followed—*e.g.* premeditation is not made, as under the French law, a necessary element of murder;[6] and a Criminal Procedure Code[7] also based on English practice.

Successively used as a port of call by the Portuguese, occupied by the Dutch, and definitely incorporated by France into her colonial system, the island of Mauritius was ceded to England by France by a Capitulation dated December 3, 1810. So far as I am aware, neither the Portuguese nor the Dutch have left any trace of their occupation on the laws of Mauritius, although physical remains of the Dutch settlement, consisting principally of an old pulpit and the floor of a *salle d'armes*, are to be found on the south-east coast of the island, and the name Mauritius is of course of Dutch origin. Possession of the island was taken on behalf of the King of France in 1715. From 1721 to 1767 it was governed by the French East India Company, whose period of administration included the governorship (1735-46) of the famous Mahé de Labourdonnais. In 1767 it was transferred to the French Crown. From 1790 to 1803 it was administered by the Governor and Colonial Assembly. From 1803 to 1810 it was governed by General Decaen, Captain-General of the French possessions east of the Cape. The eighth article of the Capitulation to England expressly preserved to the inhabitants their religion, laws, and customs. The Capitulation was confirmed by a Proclamation of December 5, 1810,[8] but the Treaty of Paris (May 30, 1814) ceded the island to England in "full right and sovereignty" and contained no allusion to the preservation

[1] Ordinance 42, Laws of St. Lucia, p. 125. [2] *Ibid.* p. 126.
[3] *Ibid.* pp. 151, 152; Ordinance 52, and Proclamation of February 15, 1882.
[4] Civ. Code, Art. 2485; Code Civ. Proc., Art. 1087.
[5] Laws of St. L., No. 101. [6] See s. 261.
[7] *Ibid.* p. 474, No. 102. [8] Code Farquhar, No. 2, Rev. Laws, p. 5.

by the Capitulation and the Proclamation of 1810 of the laws in force in the Colony under the old French *régime*. The conclusion of the Treaty of Paris was notified by a Proclamation of December 15, 1814.[1] But the treaty was never confirmed by any Imperial statute, and the maintenance of French law in Mauritius depends solely on the Capitulation, the Proclamation of December 5, 1810, and the rule to which I have already referred, that the law of a conquered or ceded Colony at the time of conquest or cession remains in force till it has been altered by competent legislative authority. The French laws thus preserved in Mauritius fall into several classes: (1) Those enacted down to June 1787. They are collected in the Code Delaleu, so called from the name of its compiler, who was a member of the Conseil Supérieur. (2) Those passed between June 1787 and September 1803. (3) The Code Decaen, so called from General Decaen, coming down to 1810, and containing the arrêts which successively introduced into the island, with modifications, the French Code Civil of 1805, Code of Civil Procedure and Code of Commerce. Neither the Code Pénal nor the Code d'Instruction Criminelle was ever promulgated in Mauritius. Criminal procedure was regulated mainly by the French Criminal Ordinance of 1670 till 1831; and for the substantive criminal law recourse was had to the old French penal law of October 6, 1791, till 1838.

The Seychelles Islands—explored by the direction of Labourdonnais, and called at first the "Îles de Labourdonnais," passed to the French Crown between 1754 and 1756—acquired their present name from the Vicomte Hérault de Séchelles, then Controller of Finance in France, although the capital continued to bear—as it does to this day—the Christian name of Labourdonnais. On May 17, 1794, the Seychelles were captured for the British by Captain Newcome of H.M.S. *Orpheus*; and the Capitulation of that date was renewed in 1806 by Captain Ferrier of H.M.S. *Albion*. Neither of these Capitulations seems, however, to have been definitive, for we find that the acts of civil status in Seychelles continued to bear the dates of the Revolutionary calendar up to An XIV.; and that the legislation of Mauritius, then styled the "Île de France," was, as occasion arose, applied specially to Seychelles. As an instance of this I may refer to the arrêt of Decaen, which regulated the functions of notaries, and is still the organic law in Mauritius and Seychelles on that subject. By Art. 6[2] of the Capitulation of December 3, 1810, Mauritius "and its dependencies," including Seychelles, were ceded unconditionally to the British Crown. Art. 8[3] provided that "the inhabitants shall preserve their religion, laws, and customs." This Capitulation was confirmed by the Proclamation of December 5, 1810;[4] and in 1815 by Art. 8[5] of the

[1] Rev. Laws, iv. p. 8.
[2] Code Farquhar, No. 1, Rev. Laws (Mauritius), 1905, iv. 1, at p. 3.
[3] *Ibid.* p. 3. [4] Code Farquhar, No. 2, *ibid.* p. 5.
[5] Rev. Laws (Mauritius), iv. 8; Rev. Laws (Seychelles), i. p. vi.

Treaty of Paris. A Proclamation of 1815[1] confirmed the maintenance in the dependencies of the Isle of France of the laws of that Colony in relation to such dependencies and the general powers of its Government to pass laws applicable thereto. The result of the first part of these provisions was to constitute the Code Civil, the Code of Civil Procedure, and the Code of Commerce, all of which were then in force in Mauritius, as the law of Seychelles. The government of Seychelles was at first (from 1815 to 1852) administered by local Civil Agents and Civil Commissioners, under the direct orders of the Governor of Mauritius, and under Mauritius laws applicable by implication (a category of which there are said to be now few survivals)[2] or extended by express enactment or by Proclamation. In 1852 the Governor was empowered to extend the laws of Mauritius to Seychelles and the other dependencies with such modifications as were necessary.[3] In the following year,[4] this power was withdrawn from the Governor and conferred on the Governor in Executive Council. Twenty years later[5] a cautious relaxation of the ties between Mauritius and Seychelles was made by the separation of their finances, and the constitution in Seychelles of a Local Board of Civil Commissioners with power to make regulations for the peace, order, and good government of the Colony. But the supervision of the Governor of Mauritius and the supreme legislative authority of the Council of Government there were explicitly maintained, both in the Order in Council creating the Board and in an extension of its powers in 1874[6] and 1882.[7] In 1888 an Order in Council of December 17 and letters patent of December 27 created a legislative council in Seychelles *vice* the Local Board, and a Supreme Court subordinate to that of Mauritius; but again reserved[8] the legislative power of Mauritius. There was a similar reservation in letters patent of July 21, 1897, and June 7, 1901. In 1903, however, Seychelles was erected into a separate Colony,[9] and the Order in Council[10] which created its new legislature, while continuing the operation in Seychelles of the Mauritius laws applicable in 1903, confers on the legislature of Seychelles express power to repeal any such law either in terms or by implication from the fact that it has passed an enactment dealing with the same subject-matter. The French laws now in force in Seychelles are those applicable to Seychelles as a dependency in force in Mauritius in 1903, except in so far as they have been affected by Seychelles legislation.

It appears, therefore, as the result of the foregoing survey, (1) that one of the historic French customs—the Coutume of Normandy—was firmly

[1] Mauritius *Government Gazette*, April 29, 1815.
[2] Rev. Laws (Seychelles), i. Introduction.
[3] No. 20 of 1852, s. 1.
[4] No. 14 of 1853, s. 1.
[5] O. in C. of April 22, 1872.
[6] O. in C. of January 26, 1874.
[7] Ordinance 4 of 1882.
[8] Clause 8.
[9] Letters patent of August 31, 1903.
[10] Seychelles Legislature Order in Council, 1903.

established, and is still in its main principles law, in the Channel Islands; (2) that, although from the very nature of the case it is impossible to localise either the precise dates at which, or the forms under which, the influence was exerted, the law of France has in fact deeply influenced both the substantive and the adjective law of Scotland; (3) that the other great French custom—the Coutume of Paris—became the basis of the civil law of Quebec and St. Lucia; and (4) that in Mauritius and Seychelles three of the Napoleonic Codes were introduced. It only remains to add that wherever, and in so far as, Great Britain has sanctioned the maintenance of French law in her Colonies, she has made the gift complete. For the Privy Council in applying it interprets it as French law[1] and French authorities are freely cited as illustrations of the decision at which a French tribunal might be expected to arrive in regard to the problems that it presents.[2]

II. POINTS ON WHICH FRENCH LAW, OR THE INFLUENCE OF FRENCH LAW, HAS BEEN MAINTAINED.

[*Contributed by* Mr. Justice Wood Renton, *of the Supreme Court of Ceylon.*]

In the first lecture of the course, I endeavoured to trace the circumstances under which, and the forms in which, French law came, at different points, to enter, either by way of direct incorporation or merely as an historical influence, into the composition of British Imperial jurisprudence. The result was to show (1) that the Custom of Normandy was the foundation of the common law of the Channel Islands, (2) that, through the avenue supplied by the Ancient League, French law, in forms which it is impossible to localise precisely, had divided with Holland the task of imparting to the law of Scotland something at least of its affinity to the law of Rome and to the Germanic customs which co-existed with that law in the old French monarchy; (3) that the Custom of Paris and bodies of pre-Revolutionary legislation, and, to some extent, of the early legislation of the Revolution in France, had furnished the basis of the common law of Quebec and St. Lucia, and (4) that similar bodies of legislation had been applied to, while three of the Napoleonic Codes had been adopted as the law of, Mauritius and Seychelles. I proceed now to attempt a cursory survey of the extent to which these different bodies of law, and, in the case of Scotland, the historical influence of French law, have been maintained.

[1] See *Procureur-Général* v. *Bruneau*, (1866) L.R. 1 P.C. 169, 191.

[2] *Symes* v. *Cuvillier*, (1880) 5 A.C. 143, 144. In this case it was held also by the Privy Council that the Reports of the Commissioners on the Quebec Code may be looked at, although not entitled to the weight due to a judicial opinion.

Both in Jersey and in Guernsey the islanders have clung with remarkable pertinacity to their ancient laws. The preservation of the Custom of Normandy was secured in Jersey not only by the *Grand Coustumier* and the Commentaries of Terrien, Poingdestre (1669-76), and Le Geyt (1676-1711), but by a series of Charters [1] confirming the privileges of the inhabitants by the Code of 1771,[2] by the power of the States to enact local Ordinances in force for three years, without the express allowance of the Crown, if not expressly disallowed,[3] and also by the successful use—to which I referred in my first lecture—made by the States of their claim to refuse, if they think fit, registration to Orders in Council.[4]

The law of real property in Jersey is still the general feudal law introduced into the island as part of the Custom of Normandy,[5] though there are differences between the laws of Jersey and Normandy in details.[6] The Norman law, with modifications to be noticed in my last lecture, survives as to seigneurial rights,[5, 6] as to succession to real property,[7] as to the relation between wills and codicils,[8] as to dower [9] and the rejection of community between the spouses,[10] as to curatelle,[11] and as to the right of expectant heirs to impeach improvident bargains [12]—I am merely selecting a few instances of points that have come before the Privy Council, or form the subject of express notice in the Report of the Jersey Commissioners. Jersey and Guernsey, also, are free from the operation of the divorce law ;[13] and the application of the English law restricting the time for accumulations.[14] Five of the ancient manors in Jersey are still, it seems,[15]

[1] First Report, Commissioners of 1846, App. p. 260.

[2] Report of Commissioners, 1860-61, p. vi. A commission to prepare a code of laws for both Jersey and Guernsey had been issued in 1608 to the respective bailiffs of those islands, but the matter dropped and was not revived : Le Quesne, pp. 229, 230.

[3] *Ibid.* p. vii. [4] Anson, *Law and Custom of Const.*, ii. pp. 54, 55.

[5] Report of Jersey Commrs., 1860-61, p. ix.; *De Carteret* v. *Baudains*, (1886) 11 A.C. 214, per Lord Blackburn at p. 219 ; *A.G. for Jersey* v. *Turner*, (1893) A.C. 352. See also *Godfray* v. *Constables of I. of Sark*, (1902) A.C. 534.

[6] *E.g.* as to Crown fiefs, *A.G. for Jersey* v. *Le Moignan*, (1892) A.C. 402.

[7] Report, 1860-61, pp. x., xii. [8] See *Falle* v. *Godfray*, (1888) 14 A.C. 70.

[9] Report, 1860-61, p. xiv. [10] Burge, 2nd ed. vol. iii.

[11] *Ex parte Nicolle*, 5 A.C. 346.

[12] *Godfray* v. *Godfray*, (1866) 14 W.R. 522. But there the Privy Council found that local usage had modified the old Norman law as to void and voidable transactions. Fourteen cases were found ranging from 1588-1842, in which transactions forbidden by the *Coutumier* had been upheld by the Jersey Court as voidable only. The category included sales by expectant heirs, which could only be set aside within one year and one day from the opening of the succession on proof of fraud or undervalue. See also *Dyson* v. *Godfray*, (1884) 9 A.C. 731. As to bankruptcy, see *Williams* v. *Stevens*, (1866) 4 Moo. P.C. N.S. 235.

[13] *Le Sueur* v. *Le Sueur*, 1 P.D. 139.

[14] *Haldane* v. *Eckford*, (1871) 24 L.T. 934.

[15] See an interesting article on "Jersey, Guernsey, Alderney, and Sark," in *The Church Quarterly Review* for April 1909, vol. lxviii. at p. 120.

held of the Crown—St. Ouen, Rozal, Melesche, Trinite, and Samarés—although the rights of the feudal lords, or *hauts justiciers*, are now somewhat shadowy.

In matters of procedure, and generally in everything pertaining to the atmosphere of the Courts, both Jersey and Guernsey are Norman still.[1] The curious "Clameur de Haro," a form of appeal to justice by which encroachments on property are promptly brought before the Courts, itself bewrays in its last word, said[2] to be a corruption of "Ha Rollo," its Norman origin; although in Jersey, and I think Guernsey also, it is not, as under the Norman law, principally raised in matters of a personal and criminal character, but relates to cases affecting real property, and, uniting with itself *causes en ajonction*, is a civil remedy as well as a criminal and prerogative prosecution.[3] I believe that while the leading members of the Bar of Jersey —formerly limited by immemorial custom to six advocates,[4] but thrown open by Order in Council in 1859[5]—and of the Bar of Guernsey are also members of the English Bar, it is not unusual to add to, or substitute for, the English qualification a legal education in France. In both Jersey and Guernsey the proceedings, and oral pleading, in the Courts are in French, although witnesses may give evidence in English; and, as one can see by reference to the official reports of appeals from the Channel Islands to the Privy Council, the formal structure of the judgments of the Royal Courts is that with which French law reports have made us familiar —a brief connected statement of the facts, a decision of the particular point in issue, and a resolute avoidance of *obiter dicta*.

The existing Constitutions of Jersey and Guernsey are suggestive also of French analogies. In both, the Royal Court was probably at first the seat at once of legislation and of justice. In Guernsey, it still shares the legislative powers of the States; and in both islands its members in different capacities continue to exercise legislative, as well as judicial, functions. I abstain, however, from any attempt to work out historically the relation between the Royal Courts and the States, in Jersey and Guernsey on the one hand, and French or Norman institutions on the other; or to plunge more deeply into the fascinating inquiry as to the present state of the old Norman law in the islands. Expert and local opinion is divided on these matters, and I have no kind of qualification for dealing with them. I have tried merely to fix on a few points, on what seemed comparatively firm ground, for the purpose of showing that, in the Channel Islands, the old law, both in its letter and in its spirit, is still strongly maintained.

[1] See an interesting paper on "The Office of Jurat in the Royal Courts of Jersey and Guernsey," by Mr. Bedwell, Librarian of the Middle Temple, in 34 *Law Mag. and Rev.* 166.

[2] Le Quesne, pp. 38, 39.

[3] *Ahier* v. *Westaway*, (1855) 9 Moo. P.C. 395, 399, *n.* (a).

[4] *D'Allain* v. *Le Breton*, (1857) 11 Moo. P.C. 64.

[5] O. in C. of July 7, 1859. *In re the Jersey Bar*, (1859) 13 Moo. P.C. 263.

In my last lecture I noted incidentally some of the points in regard to which traces of the Ancient League, which amounted at one time to actual internationalisation (Scots Act, 1558, c. 6), between France and Scotland are still visible in the legal life of the latter country. Such traces exist abundantly in the terminology of Scots law, and are to be found even in the present constitution and procedure of the Court of Session. It is, however, in the substantive law of Scotland that their presence is most unmistakable. The *jus relictæ* of the widow—one-third of the husband's movables if there are, and half if there are not, children of the marriage—is equally of French origin, so far as Scotland is concerned, whether, according to Professor Walton,[1] it is a true right of succession—as would be the case if Lord Fraser's[2] view is correct that the *communio bonorum* was not introduced into Scotland from France till the seventeenth century—or merely a survival of the widow's share of the property of the community between herself and her husband. So the widow's *terce*—a life-rent of one-third of her husband's immovables—is the French *douaire*; the children's legitim, or *bairns' part*, half if there is not, one-third if there is, a widow, is in substance the French *réserve*, though in Scotland it attaches to movables alone; and the *dead's part*, over which testamentary power exists, is the *quotité disponible*; the husband's "curtesy" is of ultimate Norman origin in Scotland as in France, and, I suppose, in England itself. From France, Scotland took not only these family rights, but practically her whole law of obligations, contracts, possession, prescription, and servitudes. There are other points that might be noted. Down to the middle of last century, there survived in certain districts of Scotland a curious form of lease, known as "steelbow,"[3] under which the lessee received his farm stocked with cattle and implements, which he was free to use during the subsistence of the lease, but bound to replace in quantity and value at its close. This "steelbow" resembles the French *cheptel à fer*, although it would be hazardous to assert positively that it was imported into Scotland from France. It has also been suggested, if I may pass to quite a different subject, that the legal influence of France on Scotland survives in the alleged readiness of the Scotch advocate, as compared with his English brethren, to discuss cases on principle instead of on precedents. But to pursue analogies of this description would lead us too far. It would bring us, by a *facilis descensus*, to the discussion of the survival of French social influences north of the Tweed, in the national preference for claret, and even, I believe, in the mode in which a Scotsman eats his oyster.

In the settlement of the civil law of Quebec in 1866, the claims of two distinct and, in great measure, rival bodies of law had to be considered and adjusted—those of the Custom of Paris and the old French

[1] "Relationship of the Law of France to the Law of Scotland," in the Report of the twentieth Conference of the International Law Association, held at Glasgow in 1901.

[2] *Husband and Wife*, i. 648. [3] See *Encyclo. of Scots Law*, tit. "Steelbow."

legislation, in so far as it had been introduced into Canada on the one hand, those of the Napoleonic codification on the other. The Act[1] appointing the Commissioners for the codification of the laws of Lower Canada, whose Reports[2] form such an invaluable commentary on the Quebec Code, itself prescribed the attitude that they were to adopt towards the old and the new law. They were required[3] to insert in the Code the civil laws of a general and permanent character actually in force, to exclude those that had become obsolete, and to give their suggested amendments, apart and distinct from the text of the existing law so declared, with the reasons and authorities for every change proposed. This strict definition of the powers of the Commissioners, however cramping and irksome it may have seemed at the time, has added greatly to the historical value of their work. It has secured to us a clear statement both of the ancient and of the modern French law on each topic covered by the Code, and of the extent to which, and the grounds on which, the provisions of one or other of them where they differed, and of both where they agreed, have been adopted. On a variety of important points, the old French Law has been retained in preference to the *régime* of the Code Civil. In regard to "absence" in the legal sense of the term, the Commissioners had at first intended to adopt the provisions of the Code Civil; but, compelled by their instructions to go through the old French laws, they ultimately evolved and submitted a scheme borrowed from these and from the provincial statutes and the jurisprudence and usages of the tribunals.[4] Again, as under the old law, there is no divorce *a vinculo*[5] in Quebec. The wife is more firmly subjected by the Code—as by the old law—than in the Code Civil to her husband's control, the absence of marital authorisation in the cases in which it is required by law being fatal to the validity of the unauthorised act,[6] and the incapacity of a wife to bind herself for her husband being maintained.[7] On the other hand, in some respects the Quebec Code, still following the old law, gave greater latitude in regard to marriage than the Code Civil. It preserved the former limits of age—fourteen for males and twelve for females—at which capacity to marry arose.[8] It did not impose upon a widow the prohibition under the Code Civil[9] of

[1] 20 Vict. c. 43, ss. 4-7.

[2] Reports of the Commissioners for the codification of the laws of Lower Canada (Quebec).

[3] Second Report, p. 140.

[4] See First Report, p. 167; C.C. (Q.) Arts. 86 *et seq.*; C.C. Arts. 112 *et seq.*

[5] See Second Report, p. 189; C.C. (Q.) Art. 185, and cf. C.C. Art. 227.

[6] *Le Code Civil, 1804-1904: Livre du Centenaire*, pp. 725-31 (M. Mignault's paper on "Le Code Civil au Canada"); C.C.(Q.) Art. 183, and cf. C.C. Art. 225.

[7] C.C. (Q.) Art. 1301. Ignorance on the part of the lender that the money was borrowed for the husband's purposes is of no avail, and the burden is on him to prove that it was not so borrowed: *Trust and Loan Co. of Canada* v. *Gauthier*, (1904) A.C. 94; cf. C.C. Art. 1431.

[8] Second Report, p. 177; C.C. (Q.) Art. 115; C.C. Art. 144.

[9] Art. 228

remarriage within ten months of her husband's death. It dispensed with the consent of grandparents to the marriage of minors, where the Code Civil provided for it ;[1] and—more important still—it suppressed[2] the system of "respectful requisitions" which had been introduced into the French Code, as we know from the preliminary discussions,[3] to inspire greater respect for the parental authority, weakened by the Revolution, but which had come in time to be not the least intricate part of what Balzac has characterised in his immortal *Contrat de Mariage* as that *grande comédie qui précède toute vie conjugale*, and which has recently been modified in France itself. "Il importe," says the author of the law of June 21, 1907, by which that modification was effected, "que la famille ne soit pas une somptueuse demeure, d'accès difficile, ouverte seulement à ceux qui ne reculent pas ni devant les formalités, ni devant les dépenses."[4]

The Quebec Code has also followed the ancient jurisprudence of France in rejecting adoption and the curious system, preparatory to adoption, which exists under the Code Civil as *la tutelle officieuse*,[5] and legitimation *per subsequens matrimonium* is not in Quebec, as under s. 331 of the Code Civil, dependent on acknowledgment.[6] In confirmity with the jurisprudence of the Parliament of Paris, and also with the Code of Louisiana, it has expressly conferred on parents the right of overcoming the disobedience of their children by moderate correction, and of delegating their powers in this respect to others,[7] in lieu of the elaborate scheme of correction under magisterial supervision created by the French Code, and excluding, according to one distinguished jurist,[8] whose view of the law is, I hope, *not* honoured in the observance in France, any right of domestic chastisement.

The Code of Quebec further makes an interesting departure from the Code Civil, and to some extent also from the customary law in regard to tutors.[9] The Roman law, and the law of certain provinces in France prior to the Code, recognised three forms of tutorship—testamentary, legitimate, and dative. The two first of these were not generally admitted under the customs, but within the jurisdiction of the Parliament of Paris a testamentary nomination gave a preference to the dative appointment, unless the judge, with the advice of the Family Council, decided otherwise. The Code Civil recognises four classes of guardianship—the natural guardianship of the father and mother, guardianship given by the father and mother, the legitimate guardianship of ascendants, and dative guardianship, properly

[1] C.C. Art. 150, and cf. C.C. (Q.) Art. 122.
[2] C.C. (Q.) Art. 123 ; cf. C.C. 152.
[3] Maleville, *Analyse du Code Civil*, i. p. 152.
[4] *Ann. de Lég. fran.* 1908, p. 156.
[5] Second Report, pp. 197, 203 ; C.C. Arts. 361-70.
[6] *Ibid.* p. 201 ; C.C. (Q.) Art. 237 ; C.C. Art. 331.
[7] *Ibid.* p. 203 ; C.C.(Q.) Art. 245 ; cf. C.C. Arts. 375 *et seq.*
[8] Laurent, iv. s. 275 ; *contra*, Demolombe, vi. s. 309 ; Aubry et Rau, vi. s. 550.
[9] Second Report, p. 207 ; C.C. (Q.) Art. 249 ; C.C. Art. 389 *et seq.*

so called. The Quebec Code, reverting to the prevalent customary type, provides for dative guardianship alone. Such guardianship is conferred by the Court or judge, on the advice of the Family Council. Again, emancipation under the Code of Quebec is that of the Coutumes, and not the emancipation of the Roman law, the *pays du droit écrit*, or the Code Civil.[1] Under the Roman law, the *droit écrit*, and the Code Civil, emancipation was a termination of the *patria potestas* or *puissance paternelle*. Under the customary and Quebec law, it consisted in constituting the minor administrator of his property, and in freeing him from tutorship, but at the same time in placing him under a curator to assist him in acts that he could not legally do alone. Neither in the old French law nor in the Quebec Code is there any provision for such a revocation of emancipation as the Civil Code renders possible.

In regard to marriage settlements, too, the Quebec Code has followed the Custom of Paris and not the Code Civil,[2] including[3] dower (*douaire*) which the French Code omits, excluding the *régime dotal*, which it recognises,[4] retaining the continuation of community,[5] which it has abolished, and conceding almost unlimited liberty of stipulation.[6] The provisions of the Quebec Code as to acts of civil status, too, are mainly taken from the provincial laws, which were based on the Ordinance of 1667 and the explanatory Declaration of 1736.[7] The Quebec Code retains emphyteusis, which the Code Civil omitted, either because it had ceased to exist in France at the time when the Code was promulgated, or on the theory that it was included under usufruct.[8] In the last place the Quebec Code admits substitutions, limited to two degrees, such as existed in the last stage of the customary law,[9] whereas under the Code Civil they are only tolerated in an indirect and very restricted form.[10]

I have said enough, I think, now to justify M. Mignault's description of Quebec as *la fille de la France coutumière*. I turn to the points on which preference has been given in the Quebec Code to the Code Civil. Equally with the Code Civil,[11] it departed from the old law requiring *traditio* for the passing of rights *in re*. Under both Codes the contract alone had the effect of *traditio*.[12] Both took away from the Courts the right which was exerted with great freedom in the old law of France and, though not to the same extent, of Canada[13] to diminish stipulated damages for the inexecution of obligations. Both imposed a limit of time, unknown

[1] Second Report, p. 219; C.C. (Q.) Arts. 314-23; C.C. Arts. 477 *et seq.*
[2] Arts. 485, 486.
[3] C.C. (Q.) Art. 1426.
[4] C.C. Art. 1540.
[5] C.C. (Q.) Arts. 1323 *et seq.*
[6] C.C. (Q.) Art. 1257.
[7] First Report, p. 157.
[8] Third Report, p. 363.
[9] Mignault, *ad loc. cit.*; Fifth Report, p. 191.
[10] Mignault, *ad loc. cit.*; C.C. (Q.) Arts. 925 *et seq.*; cf. C.C. Arts. 896 *et seq.*
[11] Arts. 1582, 1583, and cf. Dalloz, *Jur. Gén.* tit. "Vente," n. 40.
[12] First Report, p. 14; C.C. (Q.) Art. 1472.
[13] *Ibid.* p. 18; C.C. (Q.), Art. 1076; C.C. Arts. 1152, 1231.

to the old law, within which actions of nullity of marriage had to be brought.[1] It is, however, in regard to succession [2] that the Quebec Code associated itself most definitely with the Code Civil. Under the Roman law, as it was ultimately declared by the 118th and 127th Novels of Justinian, and the *droit écrit* based on that law, there was no distinction for purposes of succession between the different kinds of property. Each individual was regarded as possessed of one inheritance, which went, whatever its constituents might be, according to certain definite rules, to his nearest relatives.

The customary law, on the other hand, was extremely complicated. In the Custom of Paris, *e.g.* the following classification of property entered into the law of succession: (1) movables, (2) immovables, (3) propres, (4) acquêts, (5) real propres, (6) fictitious propres, (7) propres nascent, (8) propres ancient, (9) propres paternal, (10) propres maternal, (11) propres lineal, (12) propres without line of descent. The Code Civil derived its system of succession from the Roman law, and the Quebec Code followed the Code Civil. On all these points, however, the law adopted by the Quebec Code, whether from the old or the new jurisprudence, secured the maintenance, in one form or the other, of French law. This observation applies not only to the matters of which I have already spoken, but generally to the law of obligations [3] and to sale,[4] exchange,[5] lease and hire,[6] mandate,[7] deposit,[8] and suretyship.[9]

On a few points, the Quebec Code has struck out on lines of its own. Thus its provisions as to the enjoyment of civil rights are more liberal than those either of the old French law or of the Code Civil, which gave to a foreigner in France only the rights enjoyed by Frenchmen in the alien's country.[10] Again, the Quebec Code does not follow the Code Civil [11] in giving to parents the enjoyment of their children's property up to the age of eighteen or emancipation. This was practically the *garde bourgeoisie* of the Custom of Paris [12] and it was never introduced into Quebec.[13] Further,

[1] Second Report, p. 183, and see C.C. (Q.) Art. 153; C.C. Art. 185.

[2] Fifth Report, p. 110; C.C. (Q.) Arts. 596 *et seq.*; C.C. Arts. 731 *et seq.*

[3] First Report, pp. 7, 8; C.C. (Q.) Arts. 982 *et seq.*

[4] Fourth Report, p. 6; C.C. (Q.) Arts. 1472 *et seq.*

[5] *Ibid.* p. 20; C.C. (Q.) Art. 1596-9.

[6] *Ibid.* p. 22; C.C. (Q.) Arts. 1600 *et seq.* *Bail à cheptel*, taken by the French Code from the customs of Bourbonnais, Berry, Brittany, and Nivernois, where it was of daily occurrence, and not from that of Paris, was rare in Quebec, and is dealt with briefly in the Code. See Arts. 1698-700.

[7] Sixth Report, p. 6; C.C. (Q.) Arts. 1701 *et seq.*

[8] *Ibid.* p. 20; C.C. (Q.) Arts. 1794 *et seq.*

[9] *Ibid.* p. 38; C.C. (Q). Arts. 1929 *et seq.* The Roman doctrine of antichresis was not admitted under the customary law. The antichrese of the Code Civil (Arts. 2085-91) was a different thing. Under the Quebec Code, a pledge of immovable property is subject in most respects to the rules as to the pledge of movables. Sixth Report, p. 50; C.C. (Q.) Art. 1974.

[10] First Report, p. 149; C.C. (Q) Art. 18; and cf. C.C. Art. 8.

[11] Arts. 384-7. [12] Art. 266. [13] Second Report, p. 205.

the scheme of prescription under the Quebec Code is a composite one—a fact due to the mixture of English law in commercial matters with the old French law; but it follows the Code Civil in the main.[1]

Although the maritime law of Quebec is to a great extent based on the famous French Code de la Maritime of 1681, the whole subject is so closely interwoven with the question of the part that English commercial law has played in the composition of the Code that I shall reserve what I have to say about it for my concluding lecture.

To a certain extent, the development of the law of gifts and wills has also been shaped by the law of England. But as regards both gifts and wills, there remains in the present law of Quebec a sufficient substratum of French influence to justify their inclusion here. The Quebec Act of 1774,[2] as we have already seen, and a provincial statute of 1801 [3] introduced into the Colony the free power of testamentary disposition existing under English law. "It shall and may be lawful," runs the Act of 1801, "for all and every person or persons of sound intellect and of age, having the legal exercise of their rights, to devise or bequeath by last will and testament, whether the same be made by a husband or wife, in favour of each other or in favour of one or more of their children, as they shall see meet, or in favour of any other person or persons whatsoever, all and every his or her lands, goods, or credits, whatever be the tenure of such lands, and whether they be *propres*, *acquêts*, or *conquêts*, without reserve, restriction, or limitation whatsoever, any law, usage, or custom to the contrary . . . notwithstanding." Provisos were added maintaining the existing incapacity of husbands and wives to devise more than their respective shares of the community, and the law against alienation in mortmain. It is obvious that the adoption of the principle of freedom of willing was bound to necessitate great changes in the old law; and, long before the preparation of the Civil Code, one of the most important of these changes—viz. the assimilation of the position of the universal legatee, and the legatee by general title, to that of the heir—had begun. The Commissioners carried out the policy of the Quebec Act and the provincial Act of 1801 to its logical conclusion. Departing at once both from the old French and from the old Canadian law, and differing considerably from the scheme of the Code Civil, which retains, as regards gifts and wills, reservations in favour of family relationship, they evolved a scheme in which (1) the freedom of testation existing in the law of wills was imported into the law of gifts *inter vivos*;[4] (2) the assimilation of the position of the legatee to that of the heir was extended by investing[5] the particular legatee with the immediate seizin of his legacy (without delivery), which the universal legatee already enjoyed;

[1] Third Report, p. 411; C.C. (Q.) Arts. 2183 *et seq.*
[2] 14 Geo. III. c. 83.
[3] 41 Geo. III. (Q.) c. 4.
[4] Fourth Report, p. 151; cf. C.C. (Q.) Arts. 759-61.
[5] Fourth Report, pp. 169, 183; C.C. (Q.) Art. 142; C.C. (Q.) Art. 891.

and (3) by maintaining, side by side, the English principle of free testamentary disposition, the restriction of that principle necessitated by the French law of community, and the French and English forms of wills.[1] The subject of the form of wills presented considerable complexity because of the co-existence in Quebec of the French and English forms in regard to it. In those parts of France where the *droit écrit* prevailed, say the Commissioners, "and within the latitude given by the Roman law, wills could be made under different forms, not recognised in the customary parts of France, and particularly under the Custom of Paris. Allusion is here principally made to mystic and nuncupative wills." Neither of these forms was ever transmitted to Quebec. The authentic, or notarial will, and the holograph will alone were anciently used. To these the Quebec Act added the forms recognised by the laws of England. It is these three classes of wills that now co-exist under the Civil Code. In regard to probate, the Quebec Code has drawn both upon French and upon English law. Under the old French *régime* in Canada the authentic will required no probate; the holograph will and the will in English form were proved in what we should now, in England, call "common form." Probate in "solemn form" in the English sense was unknown. The Provincial Act of 1801 [2] above mentioned confirmed the form of probate then in use as regards wills executed in accordance with English law. On all these points the Civil Code has consecrated the existing practice.[3] It is worthy of notice that where questions turning on the freedom of testamentary power are involved, preference is given by the Courts of Quebec to English textbooks and decisions,[4] while in cases unconnected with that principle the tendency is to rely on French authorities.[5]

In my first lecture I traced to some extent the circumstances that led up to the preparation of the Civil Code of St. Lucia, and referred in particular to Mr. Musson's scheme, disapproved of by the Secretary of State and regarded by Mr. Breen as a chimera, for the amendment and consolidation of the laws of the Colony. The Chief Justice of the day—Dr. Reddie—seems to have shared the views of Mr. Breen, for in a report published in the Bluebook of 1845 he contented himself with recommending the translation of extracts from the Code of Martinique,[6] the Custom of Paris,[7] and the

[1] Fourth Report, pp. 171, 179; C.C. (Q.) Arts. 831, 832, 842.

[2] 41 Geo. III. (Q.) c. 4, s. 2.

[3] C.C. (Q.) Arts. 842 *et seq.*, 856 *et seq.*

[4] See *Renaud* v. *Lamothe*, (1902) 32 Can. S.C.R. 357.

[5] Mignault, *Droit civil canadien*, iv. p. 439, *n.* (b); and *Allan* v. *Evans*, (1900) 30 Can. S.C.R. 416, per Taschereau J. at p. 426.

[6] This Code contains the local laws applicable to St. Lucia down to 1803. Many of these, however, as well as of the French Ordinances, had by 1845 fallen into desuetude.

[7] The works on the substantive French law in use in the Courts of St. Lucia by 1845 were Pothier and Ferrière on the Coutume of Paris. From 1849 to 1872 the 1st edition (1838) of Burge's *Foreign and Colonial Laws* is said (MS. letter of Armstrong C.J. to Administrator Des Vœux) to have been the only book printed in English that was cited in Court.

local Ordinances, as a Code would be the labour of a lifetime. On December 11, 1845, however,[1] a Committee, including the Attorney, and Solicitor-General, was appointed to revise the laws, and a translation of the custom of Paris was procured from Canada. The matter, however, dropped and nothing further was done in regard to it till the time of Administrator Des Vœux, and Chief Ju stice Armstrong. The hesitation with which the problem had been approa ched by Chief Justice Reddie and the abandonment of its attempted solution in 1845 become sufficiently intelligible when we learn the actual difficulties in ascertaining the law that the authors of the Code had to face.[2] For the purpose of meeting possible objections on the part of the Roman Catholic clergy to the establishment of optional civil marriage, it became important to ascertain what the marriage law of the Colony was. The Chief Justice could find no proof of the fact that it was contained in the Custom of Paris or in the Ordinances and Edicts that had been introduced into the Colony by registration; and he thought that it must be sought for either in the Revolutionary Code of 1789,[3] which required Civil marriage, in an Edict of Louis XVI., registered in Martinique in 1787, or in an Order in Council of September 7, 1838, both of which recognised it. The authors of the St. Lucia Code had before them two alternatives:[4] either to codify the law on the lines of the Quebec Code or to assimilate it to that of the other West Indian Islands. They selected the former alter native, although[5] they also kept the latter in view as a subsidiary aim. The Civil Code of St. Lucia is, therefore, founded on the Civil Code of Quebec, and it maintains French law in the Colony substantially in the same form. In the Code of Civil Procedure, too, the Quebec Code of Civil Procedure is followed. As an illustration of the state of things that existed under the old *régime*,[6] it may be interesting to mention that every writ had to be signed by the Chief Justice, and that, if he was absent holding the Court of Appeal elsewhere in the island, no action in the capital could proceed.

As the French Code Civil, Code of Civil Procedure, and Code of Commerce were made the law of Mauritius and Seychelles practically by way of direct incorporation, it will be easier for me to indicate the extent of their maintenance

[1] MS. letter of Armstrong C.J. to the Administrator (Des Vœux), September 14, 1876. I am indebted for access to this and to the other MS. documents referred to in these lectures to the kindness of the Colonial Office.

[2] MS. letter of Armstrong C.J. to Administrator Des Vœux, January 14, 1876; MS. dispatch of Administrator Des Vœux, August 25, 1876.

[3] While Martinique had been governed for only a short time by French Revolutionary ideals, "St. Lucia adopted every Revolutionary device" and was called by the French Assembly "the ever-faithful St. Lucia": MS. letter of Armstrong C.J. to Administrator Des Vœux, September 14, 1876.

[4] MS. reports (October 7, 1876) by Mr. Semper, A.G. of Barbados, on the St. Lucia Civil Code Ordinance.

[5] MS. letter of Armstrong C.J. to the Administrator (Des Vœux), September 14, 1876.

[6] Jousse's *Traité de l'administration de justice* was the textbook, it seems, in use in the Courts under the old law.

as the law of those Colonies when I come in my last lecture to deal with the points on which they have been departed from. For the present, it may suffice to say that either in the letter, in its French form, or in the spirit, in local legislation, the Code Civil still gives the law, or supplies a basis for the law, in regard to marriage, divorce and judicial separation, obligations, and succession. The Code of Civil Procedure and the Code of Commerce have been largely repealed, either expressly or by implication. In spite of the sweeping changes both in the text of the law and in the practice of the Courts that have been reflected since the English occupation, the juridical atmosphere—I am now speaking specially of Mauritius, of which alone I have personal knowledge, but I fancy that the observation would, *mutatis mutandis*, be equally true of Seychelles—is still, in great measure, French. In Mauritius, the Supreme Court, on its civil side, except as regards bankruptcy proceedings, requires a quorum of two judges. The English idea of a single judge of first instance has not taken root. French authorities are naturally in constant use. Evidence both in civil and in criminal cases is, where necessary, taken in French, if that language is understood by the judges or judge, as the case may be—only the French patois known as "créole"[1] being translated into English. Almost alone, I think, among the Crown Colonies, Mauritius has not adopted the English Bills of Exchange Act; and it is only within very recent years that the law has been amended so as to permit shareholders and the public to inspect the register of anonymous companies.[2]

[1] See Ordinance 29 of 1891.

[2] No. 23 of 1904.

EXPERIMENTS IN EUGENICS BY AMERICAN STATE LEGISLATURES.

[*Contributed by* R. Newton Crane, Esq.]

Lord Rosebery, in his interesting address before the Society of Comparative Legislation, in June 1908,[1] upon the valuable work of the Society in accumulating information concerning new legislation in all parts of the world, referred particularly to the fact that in the State of Michigan the marriage of epileptics and feeble-minded persons had been forbidden by statute, and that in Nebraska the marriage of first cousins was prohibited. He further remarked: "This is a branch of legislation at which many will be inclined to smile now, but which has developed by the new science of which we scarcely know how to pronounce the name—the science of eugenics —one which is greatly taking up the higher minds of the country. We smile at such regulations of marriage now. If the success of the enactment in Michigan is great, if it is found that hereditary incurable defects are thereby checked, that a better and purer race is being produced, a race more competent to people the ideal State which we are always aiming at, are we sure that we shall always smile? Now it seems legislation more worthy of Plato's Republic than of practical Parliaments."

Such experiments in social and domestic regulation are by no means novel in American legislation. From the outset the legislators, long before the word "eugenics" had been coined, or what it is supposed to mean had been formulated into a science, were evidently moved to make laws and to pass ordinances with respect to marriages, not merely to thereby enforce the regulations of the Church or to promote morality, but solely to ensure a healthy product of the marriage. As Puritans and the descendants of Puritans they undoubtedly respected the Levitical law, but they were very loth to acknowledge any canons of ecclesiastical law, and certainly attached no sanctity to them. Such portions of the various statutes of Henry VIII. on the subject, and particularly that of the 32nd year of his reign, which declared lawful the marriage of all persons "not prohibited by God's law to marry," became, it is true, a part of the common law of the American States, but the Table of Affinities was never at any time a part of that law.

For this reason consanguinity, as a bar to inter-marriage between those of the same blood, appears to have had more importance in public opinion

[1] *Journal of the Society of Comparative Legislation*, No. XIX. p. 14.

and consequent legislation than affinity. Even where affinity is a legal impediment, such impediment continues only with the marriage which created it, and terminates, except in five of the States, upon the death of one of the parties, leaving the survivor free to marry the relative of the deceased. Thus, and for this reason, the marriage of a deceased wife's sister is now, and probably always has been, permissible in all the American States. In *Blodgett* v. *Brinsmead* (9 Vermont 27) the Supreme Court of Vermont said, by way of dictum: "The relationship by consanguinity is, in its nature, incapable of dissolution, but the relationship by affinity ceases with the dissolution of the marriage which produced it. Therefore, though a man is, by affinity, brother to his wife's sister, yet upon the death of his wife he may lawfully marry her sister. Such is the law of this State, whatever may be the statute of Henry VIII."

For many years the marriage of first cousins by blood has been illegal by statute in the States of New Hampshire, Ohio, Indiana, Kansas, Arkansas, Nevada, Washington, Dakota, and Montana, and has been recently prohibited in Oregon, Louisiana, Pennsylvania, Michigan, Nebraska, Utah, and Wisconsin.

There is a tendency in many of the Western States to enforce inquiry as to the physical and mental condition of those desiring to marry, whether they be related or not.

The view upon which this legislation is based is expressed by Governor Durbin of Indiana, in his message in 1905 to the legislature of that State. In it he uses the following language: "The State should exercise the right of preventing the contract of marriage between persons manifestly unfit to assume its obligations, and particularly such marriage as ensures the propagation of defectives who are certain to become a charge upon the State. . . . We may reasonably consider the advisability of requiring, on the part of those applying for licences to marry, medical evidence that the contraction of marriage will not threaten society by the perpetuation of mental or physical deficiency." In 1899 a measure making the passing of a medical examination a prerequisite to the obtaining of a marriage certificate passed the North Dakota Senate, but failed of enactment in the closing hours of the Session. Similar measures have recently been introduced in a number of legislatures, and have become law. The Michigan Act, referred to by Lord Rosebery, provides that "no person who has been afflicted with syphilis or gonorrhea and has not been cured of the same shall be capable of contracting marriage," and those offending against this law incur a penalty of from $500 to $1,000 fine, and imprisonment for five years, or both, and in case of prosecution the husband and the wife may be examined against each other, and the attending physician may be compelled to testify. In 1893 the legislature of Oregon enacted that no man or woman either of whom is epileptic, imbecile, or feeble-minded shall marry, or have sexual intercourse, when the woman is under forty-five. In Kansas in 1903 a similar statute was passed, with the addition that it shall be unlawful, under a penalty of imprisonment, for

any clergyman or magistrate to perform a marriage ceremony between such persons, and in New Jersey in 1904 it was made a misdemeanour to abet such a marriage. In another State an Act was recently passed which prohibits the marriage of one who has been confined in any public institution or asylum as an epileptic, feeble-minded, imbecile, or insane person, except upon a certificate of complete cure and that there is no probability of the transmission of such defects to the issue of such marriage, given by two regularly licensed physicians of the State. The marriage of any such person without such certificate, or the procuring of such marriage, is made a felony punishable by both fine and imprisonment. In Indiana no licence to marry may be issued to any epileptic or person of unsound mind.

Perhaps the most novel attempt to guard against propagation by unfit persons has been made, under circumstances already referred to in these columns,[1] by the State of Indiana also. The legislature of that State in 1907 passed an Act that in institutions, including prisons, having the care and custody of confirmed criminals (and all persons who have been three times convicted of felony are deemed to be "confirmed criminals"), idiots, rapists, and imbeciles, a staff of skilled surgeons shall be appointed to examine the mental and physical condition of the inmates, and, where the board of managers and the surgeons deem a case unimprovable, the surgeons may perform an operation for the prevention of procreation. It is, perhaps, upon this theory that in Maine, Michigan, Wisconsin, and Arizona all marriages become void without a decree, and therefore without the necessity of the other spouse to resort to the Courts, where either party is sentenced to imprisonment for life, and no pardon granted shall restore the convict to his conjugal rights.

[1] *Journal of the Society of Comparative Legislation*, No. XX. p. 357.

BRITISH SHIPS AND THE JURISDICTION OF THE COMMONWEALTH.

[*Contributed by* A. Berriedale Keith, Esq.]

In *The Merchant Service Guild of Australasia* v. *Archibald Currie & Company Proprietary Limited* (5 C.L.R. 737) a joint-stock company registered in Victoria were owners of a line of ships registered in Melbourne and engaged in trade between Australia, Calcutta, and South Africa. The officers of the company's ships resided in Australia and were engaged there, but the ships' articles were filed in and signed in Calcutta. The officers, though not entitled to be discharged in Australian ports, were allowed to live at such ports if they wished, with the consent of the master. The ships did no inter-State trade, but occasionally made short trips from Calcutta to other Indian ports. The organisation of employees to which the officers belonged filed a claim in the Australian Court of Conciliation and Arbitration for the settlement of a dispute between the officers and their employers as to the wages, hours, and conditions of labour during the voyages of the ships.

It was argued for the claimants that there was evidence on which it should be found that the vessels fell within the meaning of s. 5 of the Commonwealth Constitution Act. The first port of clearance was in Australia, since the port of clearance was the port at which a ship gets authority from the Customs to leave on a voyage. They admitted that it would be open to the Court to find that the voyage began at Calcutta, but the evidence pointed more strongly the other way. The proper inference was that the ships took the round voyage from Australia through Calcutta back to Australia. The port of destination meant the end of the voyage, not necessarily the most distant point of the voyage. The ship's articles were not conclusive one way or the other. In construing the words of s. 5, regard should be had to the provision as it originally appeared in s. 20 of the Federal Council Act, and it should be construed so as to include all British ships during the round voyage from Australia to Calcutta and back. Ss. 735 and 736 of the Merchant Shipping Act had already given power to a Colony to regulate the coasting trade; it should, therefore, be inferred that s. 5 was intended to go further; but it was also argued on general grounds that the laws of the Commonwealth governed the people of the Commonwealth and could be enforced against them in Australia in respect of things done

on their ships beyond the territorial jurisdiction. It was also suggested that Parliament could deal with such cases by provisions similar to those in the Customs Act, 1901, which imposed a penalty for entering port with broken seals.

In reply it was urged partly that the legislation of the Commonwealth must be territorial, partly that the first port of clearance and port of destination must relate to one voyage. The first port of clearance was that port on a particular voyage at which a ship was emptied and took in passengers and cargoes and got a clearance. The port of destination was the last port on a particular voyage where it was a round voyage, or a voyage outwards to some port from which a return journey might or might not be made. Even if a round voyage from Sydney to Calcutta and back were within s. 5, the claimants had not shown that the voyages of these ships came within that description. They must show that when the ships left the first port of clearance in the Commonwealth there was some binding agreement, arrangement, understanding, or intention that the voyage was to end in the Commonwealth. There must be some way of determining at the beginning of the voyage whether the ship's destination were in the Commonwealth or not, in order to know what law governed it on the voyage.

The Court held that they had no jurisdiction to make an award such as was asked for by the claimants. They expressly asserted that the jurisdiction of the Commonwealth Courts and the operation of the Commonwealth laws extended only to places within the Commonwealth, except so far as a larger jurisdiction or operation was given to them by law. With regard to s. 5, they pointed out that the first port of clearance was the port where the ship got her clearance on beginning a voyage, while the port of destination obviously meant the end of the voyage, and s. 5 applied only to cases where the beginning and end of the voyage were both in the Commonwealth. In the case in question it was extremely doubtful whether even the first port of clearance was an Australian port, and the port of destination was certainly not in Australia. In this judgment the Chief Justice and Mr. Justice Barton concurred.

Mr. Justice O'Connor went so far as to say that the words of s. 5 must be taken to describe a round voyage beginning and ending within the Commonwealth. The clause was meant, in his opinion, to cover a shipping trade carried on by ships owned and registered in Australia and manned and officered by Australian citizens, which extended to New Zealand and the islands of the Pacific and Indian ports. Such vessels the Constitution Act meant to place in the same position as regards Australian laws as the ordinary British ship with regard to British laws, viz. that while on a voyage coming within the meaning of this section, the Australian ship should be, for the purposes of Commonwealth laws, a floating portion of the Commonwealth territory. If once it were established that the voyage

were of that description, it was immaterial to what part of the world it might extend.

The net result of this case is, therefore, very satisfactory, for it establishes the principle that the laws of the Commonwealth are only to be enforced as a whole on vessels which in effect are engaged in the coasting trade, including, however, vessels which take voyages to the Western Pacific, New Zealand, India, etc., but eventually return to the Commonwealth, and which may be regarded as carrying on a somewhat extended coasting trade. This decision has, therefore, practically no effect on the question of the relation of the Imperial and Australian Governments as to the Navigation Bill of the Commonwealth Parliament, because it does not confer on the Commonwealth any legislative power as regards merchant shipping substantially beyond the power which they already possess under ss. 735 and 736 of the Merchant Shipping Act, 1894. Indeed, in a sense the power given by s. 5 of the Constitution is of less value to the Commonwealth as regards matters of merchant shipping than the power given by ss. 735 and 736, since not only s. 735 but also, in my opinion, s. 736 enable the Commonwealth Parliament to repeal provisions of an Imperial Act which otherwise would apply, while s. 5 of the Constitution gives no such paramount power.[1]

[1] This note is supplementary to my article on "Merchant Shipping Legislation in the Colonies" in the last number of the *Journal*.

THE ORTHODOX PRIVILEGES IN TURKEY,

WITH SPECIAL REFERENCE TO WILLS AND SUCCESSIONS.

[*Contributed by* ANTON BERTRAM, ESQ., *Judge of the Supreme Court of Cyprus.*]

ONE of the very first questions that arose out of the recent Turkish revolution was the question what was to happen to the privileges of the Œcumenical Patriarchate. It was apprehended that in the zeal for uniformity which was understood to inspire the exponents of the new ideas, these special privileges would be swept away, as inconsistent with the new era. The Patriarch himself was reported to have observed, even in the first moments of the general jubilation, that emancipation would be dearly purchased if it meant that the Greek Orthodox community was to lose its distinctive juridical status and be merged in the general mass of the Sultan's subjects. But prompt steps were taken to quiet these apprehensions. A ceremonious visit (so it was reported) was at once paid to the Phanar, and the Patriarch was assured in the most formal terms that the judicial privileges accorded to the Œcumenical Patriarchate by Mohammed the Conqueror would be scrupulously preserved.

Nevertheless, in spite of these reported assurances, it would seem that the subject is still involved in controversy. In that controversy it is not in the least the object of the present article to engage. Its object is to investigate from a legal and historical standpoint the nature and scope of the privileges with special reference to the law of wills and successions.[1]

The Concessions of Mohammed the Conqueror.—The whole fabric of the extensive privileges enjoyed by the Greek community in Turkey (still known officially as "Romans") rests upon an historic utterance of Mohammed the Conqueror. One of his first official acts was to re-establish the shattered religious organisation of his new subjects. Constantinople fell on May 29,

[1] Since this article was written, an important and interesting work on the subject under discussion has been published by Mr. Eleutheriades, a leading advocate of Smyrna and a well-known writer on legal subjects (*τὰ προνόμια τοῦ Οἰκουμενικοῦ Πατριαρχείου*, Smyrna, 1909). The present writer much regrets that he had not the advantage of reading this brilliant and penetrating examination of the question before writing this article. Had he been able to do so, he would have made fuller reference to it than is now possible.

1453. On June 1, the Conqueror, having directed the election of a new Patriarch, proclaimed the Patriarch-elect in the most honorific terms, delivered to him with his own hands the pastoral staff, and made use of these memorable words: "Be Patriarch, live with us in peace, and enjoy all the privileges of thy predecessors."[1] These words are the charter of the Greek privileges. Nor has the Patriarch ever failed to cite them whenever these privileges have been called in question. Upon them rests the considerable civil jurisdiction which he and his tribunals have always enjoyed.

The Extent of the Patriarchal Jurisdiction.—Now, what were the judicial "privileges" which before the fall of Constantinople the Patriarch and his Bishops had enjoyed? To this question there is more than one answer. According to M. Sidarouss, in his interesting work *Des Patriarcats* (Paris, 1907), the jurisdiction of the Œcumenical Patriarch under the Byzantine Emperors was approximately that which he enjoys to-day.

> En ce qui concerne la participation du clergé à l'administration civile des Chrétiens, Mahomet II l'a trouvée dans le droit civil byzantin. . . . Suivant le droit canon reconnu par l'État chrétien et observé avec grand respect, le jugement et la punition des clercs, les liens du mariage, les divorces, *les testaments, et ce qui s'y rapporte*, les écoles, les églises, la libre administration de leurs intérêts, et tout ce qui les concerne, appartenait à la jurisdiction incontestée de l'Église. . . . C'est en cette situation que l'a trouvée en 1453 le nouveau maître de Constantinople (pp. 274-5).

This explanation seems at once symmetrical and satisfactory. The privileges of the Patriarch to-day, according to this view, date from the time of the Byzantine Cæsars, and even from that of Justinian himself. Unfortunately, if other authorities are to be believed, this theory does not square with the facts. According to Mr. Karavokyros (a high authority on this subject), citing Montreuil's *Histoire du Droit byzantin*, vol. iii. (Κλεὶς τῆς Ὀθωμανικῆς Νομοθεσίας, p. 124), the supposed special canonical jurisdiction of the clergy at the time of the fall of Constantinople is a fiction. It is true that by various Novels of Justinian, Heraclios, Alexios and Manuel Comnenos, Basil the Macedonian, and Michael Palæologos, the Bishops were accorded jurisdiction in the case of all disputes between members of the clergy, and in the case of all disputes in matters of marriage between members of the laity. But in the year 1329 all this was merged in a new order. In that year the Emperor Andronicos Palæologos the younger established a new judicial system, which in effect conferred upon the clergy exclusive jurisdiction in all civil matters indistinguishably. The new tribunals consisted in each place of a Bishop and three local notables, called Καθολικοὶ τῶν Ρωμαίων κριταί, dispensing

[1] Gibbon, c. 78; Sidarouss, *Des Patriarcats*, pp. 265-74; *Turkey in Europe*, p. 266; Karavokyros, Κλεὶς τῆς Ὀθωμανικῆς Νομοθεσίας, p. 128.

justice in the church itself.[1] At the fall of Constantinople, then, the whole administration of justice was in the hands of the clergy, assisted by local notables. After the fall of Constantinople, the ecclesiastical tribunals continued to adjudicate in all cases of disputes between Christians, and according to this view the present limitation of the ecclesiastical jurisdiction is a derogation from the rights accorded by Mohammed the Conqueror. The difficulty about this point of view is that the historical process by which a general and unlimited jurisdiction became converted into a jurisdiction limited to special subjects has not yet been satisfactorily traced.

Whatever be the historical explanation, it is clear that the Œcumenical Patriarch and his Metropolitans exercised from the first a most potent civil jurisdiction, and that the scope of this jurisdiction for whatever reason included matters relating to wills and successions. "Le patriarche," say two French historians,[2] "avait en même temps que le gouvernement des affaires religieuses, un pouvoir civil qu'il exerçait particulièrement dans son diocèse, comme archevêque de Constantinople. Il avait un tribunal composé des principaux dignitaires du clergé laïque, qui se réunissait deux fois par semaine. Il statuait sur les contrats de mariage, les divorces, les legs, les testaments, les vols de peu d'importance et les délits divers." This enumeration certainly seems to point to a special and not to a general jurisdiction. The jurisdiction as to the subjects enumerated continued unchallenged and, so far as can be gathered, unchanged, down to the Hatti Humayoun, and in 1853 the Grand Vizier, Ali Pasha, in a circular addressed to the Powers on May 13, was able to declare, in words that have often since been quoted:

> Les patriarchats . . . . réunissent un tel faisceau de droits civils et religieux, que l'on peut vraiment dire, qu'à la réserve de l'autorité politique, que le gouvernement mussulman exerce seul, les Chrétiens sont plutôt administrés, jugés, et dirigés par une autorité chrétienne que mussulmane.

The Principle of the Orthodox Privileges.—Why then did Mohammed the Conqueror accord these far-reaching privileges to the Œcumenical Patriarch? And why (assuming the theory of a special, and not a general jurisdiction) did the scope of those privileges comprise the right of exercising civil jurisdiction in regard to wills and successions?

The answer to the first of these questions is a simple one. In his generous and honorific manner of conferring the privileges Mohammed

[1] Only one of these *καθολικοὶ κριταί* has survived obscurity, Armenopoulos, the *καθολικὸς κριτής* of Thessalonica, whose manual entitled Ἐξάβιβλος, an abridgment of the Basilica of Leo and Constantine Porphyrogenitus (published not long before the fall of Constantinople), is still the authoritative manual in use in the Ecclesiastical Courts of Constantinople, and is nominally the basis of the civil law of the kingdom of Greece.

[2] De Presle et Blanchet, *La Grèce depuis la conquête romaine* (Paris, 1860), p. 368, cit. Sidarouss, p. 270.

was no doubt affected by motives of policy, and also possibly to some extent by the still surviving prestige of the conquered Empire. But the actual conferment of them was entirely in accordance with one of the first principles of Islam—a principle which was followed by the Mohammedan conquerors of all ages. That principle was that the religious institutions of the conquered were not to be disturbed. "Leave them," said the Prophet, "the things of their religion," and the precept was religiously obeyed by his successors from Omar downwards.

But in what sense are wills and successions religious institutions? And were they so regarded by Moslem rulers? That marriage should be regarded as a religious institution, and that all disputes arising out of marriage and matters ancillary to it (divorce, legitimacy, dower, alimony, and maintenance) should be left to the ecclesiastical authorities of subject infidels to be determined according to their religious law, is entirely intelligible. But what of wills and successions? It is quite true that though all the Moslem law is sacred, it recognises in itself degrees of sacredness, and that special sanctity has always been attached to the law of inheritance. Mohammed himself declared, "Learn the laws of inheritance, and teach them to the people; for they are one-half of useful knowledge." Even in Turkey to-day, inheritance is one of the subjects which are withdrawn from the secular tribunals and placed within the exclusive competence of the religious Courts. The perpetuation of the family as a corporation and the devolution of its property are sacred matters in all primitive communities, and if the Moslem jurists had regarded their own law of inheritance and of the testamentary rights which modify it as matters for the faithful alone, and having no application to infidel communities, there would have been nothing surprising in this point of view. Nevertheless, the sanctity of the family corporation does not seem the idea which inspired the legislation of the Prophet,[1] nor, so far as can be gathered from a necessarily imperfect examination of the authorities, did the early jurists regard the Prophet's legislation on wills and successions as applicable to Islam alone. Thus—to take successions first—though in the case of a marriage of infidel subjects within the Moslem prohibited degrees (the example cited is that of a fire-worshipper who marries his mother) the actual marriage was valid as between the parties, if permitted by their religious law, yet the mutual rights of inheritance between the parties, arising out of the marriage and the rights of inheritance of the offspring of the marriage would seem to have been governed by the Moslem law of inheritance. (See Baillie's *Digest of the Mohumudan Law*, original

[1] Chez les tribus arabes, la grande préoccupation était la prédominance de la famille, sa richesse, sa puissance, son accroissement et son élévation. . . . Mahomet ne prit plus pour base de la dévolution l'intérêt collectif du groupe familial mais l'affection présumée que tout individu doit ressentir pour ceux qui sont unis à lui par les liens du sang ou de la parenté.—Clavel, *Droit musulman*, vol. ii. pp. 4-5.

edition, pp. 178, 179, 699, 700.) With regard to wills, the authorities are still more explicit:

> If a *Zimmi* bequeath more than a third of his property or makes a bequest to one of his heirs, it is not valid, as in the case of a similar bequest to a Moslem.—Alamgiri, cit. Ameer Ali, *Mohammedan Law*, p. 519.
>
> If a *Zimmi* bequeath more than a third of his estate to a stranger or to an heir, it is not valid as being contrary to the laws of the Mussulmans, to which they have agreed to conform with respect to all temporal concerns.—Hedaya, book lii. ch. vii.

It is clear, therefore, that whatever may be the case with regard to the rules of succession, wills, according to Mahommedan law, were not held to be essentially matters of religion. If then the basis of the Patriarchal jurisdiction is that wills and successions are "things of religion," it would seem that their religious character must be sought for in the laws and usages, not of the conquering, but of the conquered community. Is it then the case that in Byzantine jurisprudence wills and successions were invested with a specially ecclesiastical character? The answer to this question would require an examination of the state of the canon law in the closing stages of the Byzantine Empire. If, however, the Bishop was the recognised depositary of wills, and if he was also, as he well may have been, the regulator of intestate successions, it would not be unnatural that in any adjustment of the privileges of the Orthodox community the retention of these functions should have been claimed, whether expressly or tacitly, by the Œcumenical Patriarch and conceded, whether expressly or tacitly, by the Conqueror.[1]

[1] Mr. Eleutheriades (*op. cit.*) solves this problem by a theory which is as startling in its boldness as it is fascinating in its simplicity. According to the principles of Islam, Law itself is a "thing of religion." The Sheri law, based upon the utterances and actions of the Prophet, and elaborated in the confines of the mosque, was religious throughout and for the faithful alone. The jurists of Bagdad were theologians. The Qadi is a religious personage. Every trial was a religious proceeding, in which the faithful alone were competent witnesses, and in which the object in view was the ascertainment of "juridico-religious truth" (*νομικοθρησκευτικὴ ἀλήθεια*). Moslem law has consequently no applications to Christians, though they are accorded, as a favour, the right of invoking it, and the references to its applications to non-Moslems in the early authorities relate merely to cases in which they so voluntarily invoke it. As to the "privileges" accorded by the Conqueror, these were not so much privileges as rights. They proceeded from no act of grace, but were strictly in pursuance of the fundamental principles and the unbroken practice of Islam. According to those principles and that practice, Christians among themselves were entitled *in all things* to be judged by their ecclesiastical heads according to Christian law. The jurisdiction enjoyed by these ecclesiastical authorities was in the nature of the case absolutely unlimited, and extended to all cases, personal, civil, and criminal. Such is the thesis of Mr. Eleutheriades. How then did this jurisdiction subsequently come to be limited by practice, and finally by statute? It is here, alas! that the brilliant argument stumbles in its victorious march, and at this point—the crux of the whole question—instead of emerging into the daylight, we find ourselves involved in nebulous references to the *statut personnel*.

Modern Statutory Regulation of the Privileges.—In 1856, three years after the circular of Ali Pasha above cited, the Sultan Abdul Mejid issued the Hatti Humayoun, the Great Charter of the Christian subjects of the Porte. That famous document contained the following passages :

Art. 2.—Sont reconnus et maintenus, en totalité, les immunités et privilèges spirituels donnés et accordés par nos illustres ancêtres, et à des dates postérieures, aux communautés chrétiennes, et autres, non-musulmanes, établies dans notre Empire, sous notre égide protectrice. Toutefois, chaque communauté chrétienne, ou autre non-musulmane, procédera dans un délai déterminé, à la révision et à l'examen des immunités et privilèges actuels. . . . Les pouvoirs concédés aux patriarches et aux évêques chrétiens par le Sultan Mehemmet Elfâlih, de glorieuse mémoire, et ses illustres successeurs, seront mis en harmonie avec l'état et la position nouvelle que nos intentions généreuses assurent à ces communions.

Art. 18.—Les procès spéciaux, tels que ceux de succession, soit entre deux autres sujets non-musulmans, pourront, à la demande des parties, être renvoyés par devant les patriarches, les chefs de communautés et les conseils des dites communautés pour y être jugés.

In the official letter of Fuad Pasha which was annexed to the Hatti Humayoun was the following passage :

Les procès qui dépendent des lois religieuses et qui, par leur nature, ne peuvent intéresser que des musulmans entre eux, ou des chrétiens entre eux, seront portés comme par le passé devant la jurisdiction du chéri pour les musulmans et devant la jurisdiction communale ecclésiastique pour les chrétiens, lesquels tribunaux spéciaux sont régis par des lois et règlements spéciaux.

In 1861, five years after the Hatti Humayoun, there was issued a Vezirial Circular (7 Sefer 1278) recalling to the local authorities the principles governing the successions of Christians, and containing a paragraph—the faulty drafting of which was the cause of subsequent controversy—purporting to state their rights of testamentary disposition.

In the following year (1862), notwithstanding animated protests from the Patriarchate, a most important law was promulgated regulating the privileges of the Orthodox community. The Patriarchate had viewed the Hatti Humayoun itself with suspicion, and had shown no disposition to put it into operation. It seemed better to wield vague undefined powers consecrated by immemorial usage than to be bound within the four corners of a statute. The statute proved to be a measure of secularisation. It created a mixed Council composed of four Metropolitans and eight lay representatives. To this Council were committed, amongst other things, the power to certify the validity of wills (Art. 12), and the jurisdiction to try questions between members of the community relating to them (Art. 3), and such questions relating to successions as were referred to it by the

consent of the parties.[1] To the Patriarch in Synod, a purely clerical tribunal, were reserved cases of marriage, divorce, and alimony, and matters relating to the discipline of the clergy. For an account of the circumstances leading up to this important enactment the reader may be referred to Sidarouss, *Des Patriarcats*, and for a full scheme showing the jurisdiction of the ecclesiastical tribunals, central and provincial, to Karavokyros, Κλεὶς τῆς Ὀθωμανικῆς Νομοθεσίας, pp. 138-61.[2]

Singular Nature of the Orthodox Privileges.—Such in brief outline, up to this point, is the history of the ecclesiastical jurisdiction in wills and successions in Turkey. The result is certainly an extraordinary one. In the midst of an Empire governed by the Moslem common law and its own statutes are bodies, in essence indistinguishable from regular tribunals, exercising, not like our Consuls an extra-territorial jurisdiction, but so to speak an intra-territorial jurisdiction, within the Empire, over subjects of the Empire, and having the right to call upon the executive authorities to enforce their decrees.

As to the law administered by these tribunals, the position is still more singular. While all around them the common and statute law of the Ottoman empire prevails, these tribunals, in matters within their competence, apply the Roman law as it existed at the fall of Constantinople. The authoritative textbook, as above remarked, is the Ἑξάβιβλος of Armenopoulos, but in matters of wills and successions the law is practically as it was settled by Justinian. Thus it is that the Novels of Justinian, in the original Greek text in which they were promulgated, have governed the wills and successions of the Orthodox Christians of Constantinople from his day to ours.

Exclusion of Domain and Vaqf Lands from Power of Testamentary Disposition.—There is, however, one point in which the Ecclesiastical Courts are bound to take account of the law of the Empire, and that is

[1] An important difference should be here noted, the reason of which is not apparent. In the case of successions (by which is meant intestate successions: see letter of Œcumenical Patriarch to the Porte, December 22, 1890), the resort to the ecclesiastical tribunals is optional. (See Art. 18 of the Hatti Humayoun, cited above.) With regard to the validity of wills, it is obligatory. The Court of Cassation has repeatedly quashed decisions of provincial Courts which have taken upon themselves to decide as to the validity of Orthodox Christian wills. (See Karavokyros, Κλεὶς, pp. 96-8; *Droit successoral*, pp. 136-7.) The optional nature of the resort to the ecclesiastical tribunals in the case of successions is constantly insisted on, but apparently it has little, if any, significance. "Sur cent successions disputées dans ces trente dernières années pas une seule n'a eu de rapport avec le droit du chéri." (Karavokyros, *Cas d'Abdul Messih.*) See on this whole question, Sidarouss, *Des Patriarcats*, pp. 299-306.

[2] At one time the Patriarch had undoubtedly a certain limited criminal jurisdiction, not only over his clergy, but even over lay members of his communion. What was the extent of this jurisdiction and how it originated is not easy to say. With the law of 1862 it finally disappeared. While it survived the Patriarch executed his own judgments and maintained his own prison.

the tenure of domain and vaqf lands. The domain lands (*arazi mirie*) comprise practically all the agricultural lands of the Empire that have not been converted into gardens or vineyards, or dedicated to pious uses. They are the property of the State, and the cultivator has only the usufruct. He may sell and transfer them during his lifetime (subject to the formal consent of the State), but he cannot dispose of them by will. A limited right of inheritance has, however, been conceded in respect of them to certain special categories of the cultivator's next-of-kin by Imperial enactments. The vaqf lands referred to are, principally speaking, what are known as Ijaretein vaqfs, and comprise a great part of the most valuable properties in the chief towns. Here, too, the absolute property is in the pious foundation (or more strictly speaking, dedicated to God Himself), the occupier having only the usufruct. The property is transmissible *inter vivos*, but not by will, and there is a limited right of inheritance regulated by statute. To us this is a condition of affairs difficult to realise. According to our ideas, what is marketable and inheritable is also devisable. As, however, the law will not allow a Moslem to bequeath these properties by will, it will not allow a Christian to do so either. In so far as the will of an Orthodox Christian purports to dispose of properties of this description, even though certified as valid by the Patriarchate, it has no effect, and to this extent it is justiciable in the Ottoman Courts. (See circular of 7 Sefer 1278; Mixed Council Law of 1862, Art. 3; and correspondence between the Porte and the Œcumenical Patriarch, 1890.)

Relation of the Privileges to the "Statut Personnel."—The customary method of accounting for the scope of the Orthodox privileges is not to refer them, as does M. Sidarouss, to an historical situation existing before the fall of Constantinople, nor to explain them, as apparently do Mr. Karavokyros and Mr. Eleutheriades, as survivals from a jurisdiction originally unlimited, but to say that they are concerned with the "statut personnel" and that the Moslem law regards matters affecting the "statut personnel" of infidel subjects as being outside its scope and as things to be determined by their own law. Thus Mr. George Young's *Corps de Droit ottoman* (vol. i. p. 305) gives the following account of the subject:

> La loi islamique, qui a inspiré les origines et le développement de l'État ottoman, regarde toute question de statut personnel, y compris la succession, comme partie intégrante de la foi, relevant par conséquent des principes religieux, et justiciable des tribunaux religieux. Le fait que ce principe a été reconnu par les fondateurs de l'État ottoman se manifeste dans la jurisprudence primitive de l'Empire, et dans les relations administratives avec les communautés non-mussulmanes, et une preuve s'en retrouve encore actuellement dans la jurisdiction en matière successorale réservée aux tribunaux ottomans du chéri à l'exclusion des tribunaux civils. Aussi les Cours ecclésiastiques des communautés non-mussulmanes ont-elles conservé une certaine jurisdiction en matière testamentaire, en vertu d'actes formels délivrés par les Sultans ou par tolérance en vertu d'anciens usages.

A similar account is given by Savvas Pasha in his *Théorie du Droit musulman* (p. 54).

Tant qu'il s'agit de questions relatives au statut personnel des populations non-mahométanes et à leurs membres revêtus de qualités ecclésiastiques, le rôle du conquérant musulman est facile. Toutes les vérités ont dans l'isliamisme un caractère religieux; l'autorité musulmane conquérante n'éprouve par conséquent aucune difficulté, et ne commet point d'impiété, à considérer cette branche des intérêts de l'homme comme de nature absolument religieuse. Il fait profession de respecter la religion du conquis monothéiste. . . . Il défère donc sans pécher toutes les questions relatives au statut personnel de ses sujets non-musulmans aux autorités religieuses de ces derniers. Cette pratique, parfaitement conforme aux vrais principes de l'isliamisme, a été suivie par tous les souverains musulmans, Sémites et Touraniens, dans tous les pays où ils ont trouvé des populations non-musulmanes. Eumer Farouq a donné l'exemple à Jérusalem. Cet exemple a été constamment suivi: nous en avons la preuve dans la conduite sage et politique du Sultan Mehemmed II, le conquérant de Constantinople.

So elsewhere he says (p. 55):

Les questions relatives au statut personnel . . . . sont des questions religieuses. . . . Le législateur musulman . . . sait qu'elles doivent être résolues par les tribunaux religieux de ses sujets non-musulmans. . . . Le législateur de l'isliam a dit,—"outrouku hum ve ma yedinouné": laissez-leur ce qui fait partie de leur religion.

The conception of the "statut personnel" as describing and explaining the Christian privileges certainly at first sight seems a most illuminating generalisation.[1] The conception is in its original essence a territorial one. When the citizen of one country goes abroad to another, his "statut personnel" accompanies him and invests him like an atmosphere, determining his personal status and the rights and obligations that arise out of his marriage and family relationships. Even when he dies, it broods over his remains and regulates the operation of his will or the distribution of his intestate estate. What more natural then than that Islam, which conceives of mankind as being grouped in creeds rather than in nationalities, should apply this same conception to its subject races—that an infidel in Islam should be regarded much in the same way as an Englishman in France, and that all the various categories of infidels should be conceived as each of them invested with his appropriate "statut personnel" according to the law of his submerged community?

[1] The conception of the "statut personnel" (*statutum in personam, quod disponit de personarum statu, conditione et qualitate*) as distinguished from the "statut réel" (*statutum quod disponit de rebus*) has always been more familiar on the Continent than in England. (See Story, *Conflict of Laws*, § 10; Wharton, *Conflict of Laws*, §§ 85 *seq.*) For a succinct account of the controversies attending the modern development of the question, see Planiol, *Droit Civil*, vol. i. §§ 183-98. The expression "statutum" does not of course mean "status," nor is it equivalent to "statute" in our sense of the word, but denotes "the whole municipal law of the particular state from whatever source arising" (Story, § 12).

Nevertheless, with all deference to the authorities above cited, it is submitted that the formula is a fallacious one. In the first place, there is nothing in the Moslem legal system to correspond to the idea of the "statut personnel," which is a conception of mediæval European jurisprudence. In the second place, it is paradoxical to suppose that the Moslem jurists attached any special religious significance to a group of ideas with whose nexus they were utterly unacquainted. In the third place, we know as a fact that the law of wills and inheritance was not considered a purely religious institution. The Hedaya says explicitly that the Moslem law limiting the power of testamentary succession was a matter of temporal concern to which infidel subjects were bound to conform. Yet the law of wills and successions is not only an integral part of the "statut personnel," but it is also a most conspicuous sphere of the Orthodox privileges. In the fourth place, the scope of the Orthodox privileges does not in the least correspond with the scope of the "statut personnel." One of the chief chapters of the "statut personnel" is the guardianship of infants and their attainment of majority. The question of the legal status of a person under twenty-five belonging to a country where majority is attained at that age, and being in a country where majority is attained at the age of twenty-one, is one of the most elementary problems relating to the "statut personnel." But in Turkey an Orthodox Christian's attainment of the age of legal responsibility, both in the civil and the criminal Courts, is determined by the Moslem sacred law. The same is true of the law of guardianship. So also with regard to immovable property, it is generally conceded under European systems of law that whereas the devolution and devising of movables are governed by the "statut personnel," the devolution and devising of immovables are, as a rule, governed by the *lex loci*. In Turkey, however, the privileges accorded to Orthodox Christians in matters of wills and successions apply to immovables and movables alike. It is true that domain and vaqf lands are excluded from their scope. This is not, however, because these are immovables, but because these special classes of properties, according to their very nature and essence, are not devisable and devolve by special rules.[1]

The truth is that the "statut personnel" has nothing to do with the subject. It confuses rather than elucidates it. The result therefore seems to be that in view of the definition of the privileges by the law of 1862 (which was presumably, according to Art. 2 of the Hatti Humayoun,

[1] Contrast the position of an Orthodox Christian subject with that of a foreigner. By the law of 7 Sefer 1284 a foreigner may dispose by will of all immovable property subject to testamentary disposition (*i.e.* all immovable property except domain and vaqf lands). If he dies intestate, his immovables devolve not according to his "statut personnel," but according to the Ottoman law relating to inheritance. The immovables of an intestate Orthodox Christian (other than domain and vaqf lands), on the other hand, devolve according to the Roman law, as administered by the ecclesiastical tribunals. (See Chiha, *De la Propriété immobilière en Droit ottoman*, pp. 537-43.)

a codification of "privilèges actuels"), the theories of an unlimited jurisdiction on the basis of the Byzantine law, an unlimited jurisdiction on the basis of the Sheri law, and a limited jurisdiction on the basis of the *statut personnel* are all equally inconclusive. Until therefore the question has been subjected to more detailed historical investigation, it seems safer to say that the Ottoman law regards marriage as a religious institution, and treats all concomitant questions—legitimacy, divorce, betrothal, dowry, alimony—as religious matters, for ecclesiastical tribunals, and that by special favour and long usage these ecclesiastical tribunals have also acquired a certain jurisdiction with regard to wills and successions.

"**Statut Personnel**" **in Algeria, Egypt, and India.**—In other countries, however, the existence of a "statut personnel" based on creed has been deliberately and consciously recognised. Thus by the Capitulation of 1830 the Moslems of Algiers have preserved their "statut personnel" in its entirety (Clavel, *Droit musulman*, vol. i. p. 4). It is settled law in Algiers that "the transmission of property by way of succession forms part of the 'statut personnel'" (*idem.* vol. ii. p. 5). Wills are also within its scope and also the kindred subject of gifts. In the work just cited, according to the French manner, gifts and wills are treated together (book ii., Des Donations entre-vifs et des Testaments).[1]

Similarly in Egypt, the Code Civil Indigène reserves all questions of "statut personnel," in its most extended sense, for the religious Courts:

> *Art.* 16. Ils (*i.e.* les tribunaux civils) ne pourront . . . connaître des contestations relatives à la constitution des wakfs, aux mariages et autres questions qui s'y rapportent, telles que: la dot, la pension, etc., aux donations, legs, successions et toutes autres questions du statut personnel.
>
> *Art.* 54. Les successions sont réglées d'après le statut personnel du défunt.
>
> *Art.* 55. La capacité de tester et la forme du testament sont également réglées d'après le statut personnel du testateur.

In consequence, each creed in Egypt has its law of the "statut personnel." There is thus a comprehensive "Code du Statut personnel et des Successions d'après le rite hanefite," promulgated in 1875, and there are similar codes for other communities (see for example the "Code du Statut personnel pour les Coptes catholiques," cited *in extenso* Sidarouss, pp. 420-43).

In India, certain provisions of Mohammedan law have been expressly directed by the legislature to be applied to Mohammedans, and these in almost every case include the rules of succession and inheritance. Other provisions are applied to Mohammedans as a matter of "justice, equity, and good conscience," such as the law of pre-emption. So in the Panjab the subjects expressly enumerated are "succession, . . . betrothal, divorce,

[1] In Moslem law the connection between gifts and wills is not so close as in French law, according to which all gifts *inter vivos* are brought into hotch-potch for the purpose of estimating the *quotité disponible*. Donations in Moslem law are not "sujettes à rapport,"

dower . . . adoption, guardianship, minority, bastardy, family relations, wills, legacies, gifts, partitions, or any religious usages" (Panjab Laws Act, 1872). In the Central Provinces they are "inheritance, betrothal, marriage, dower, . . . guardianship, minority, bastardy, family relations, wills, legacies, gifts, partitions, or any religious usage or institution" (Central Provinces Laws Act, 1875). It is obvious that the theory which inspires these enumerations, consciously or unconsciously, is the "statut personnel," though in some instances the enumerations go beyond the theory.[1]

The Controversy of 1890.—We are now in a position to appreciate the controversy of 1890, which resulted in the issue of a Vezirial Circular finally determining the privileges of the Orthodox community with reference to wills.

Reference has already been made to the issue of a Vezirial Circular in 1861 (7 Sefer 1278), containing a paragraph purporting to state the powers of testamentary disposition belonging to Christians. To understand this paragraph, it is necessary to note certain essential features of a will according to the Roman-Byzantine law.

According to that law, it is necessary to the validity of a will that the testator should be of sound mind, that it should be executed in the presence of witnesses, and that it should be authenticated by the competent authority. The testator must institute as heirs certain categories of his kindred, or disinherit them for prescribed cause. He must also bestow upon his children, or failing children his ascendants, their prescribed "réserves," or legitim. Subject to these (and subject to certain defined rights of brothers and sisters, and of his widow, if destitute and dowerless) he may dispose of his property as he pleases. His "disposable portion" varies from one-half to two-thirds, according to the circumstances.

The Moslem law, on the other hand, is rigid and uniform. So long as a man has any heir at all, his disposable portion is limited to one-third of his property. It is in this difference as to the power of disposition that the whole value of the Orthodox privilege lies.

Now, it has been stated above that at the time when the Porte, in pursuance of the Hatti Humayoun, was taking in hand the regularisation of the Christian privileges (1861), a circular was issued (dated 7 Sefer 1278) containing a paragraph purporting to state the powers of testamentary disposition possessed by Christians. The material part of that paragraph is as follows:

"Si le *de cujus*, de son vivant et dans un état sain d'esprit, aurait, par un acte valable dressé en présence de témoins dignes de foi de sa nation et légalisé par le patriarche ou métropolitain ou évêque ou par leurs représentants, partagé tous

[1] On the subject of Mohammedan Law in India, see articles in this Journal by Sir Raymond West (1900, No. 4) and Sir Roland Wilson ("Corps du Droit Ottoman") (1906, No. 15). India (unlike Algiers and Egypt) has no Cadis, but the Sheri law is administered by the ordinary Courts,

ses biens meubles et immeubles à chacun de ses héritiers légaux ou à d'autres personnes à part, et aurait séparé *et livré à chacun d'eux sa part*, de tels actes, dont l'authenticité serait prouvée et reconnue, seront considéré valable par les juges du chéri ou autres employés du Gouvernement, et sans besoin de nouvel inventaire et partage, les biens meubles et immeubles seront laissés et confirmés à qui le droit, comme il est indiqué dans l'acte en question."[1]

It must be plain, upon the most cursory reading of this paragraph, that it is simply a clumsy and inartistic attempt (for the benefit, no doubt, of "les juges du chéri ou autres employés du Gouvernement") to describe a will according to the Roman-Byzantine law. It is true that it contains a perplexing phrase, italicised above, "*livré à chacun d'eux sa part*," which seems to suggest that the will is not valid unless the testator has made actual delivery of his bequests in his lifetime, and which indeed, if pressed, would make the document in question not so much a will as a deed of gift. But this, of course, was a mere inexactitude. This is so obvious that it may hardly seem worth while to labour it. In the first place even Ottoman Christians are not in the habit of dividing up their substance among their own children during their lifetime. In the second place, even if a Christian desired to take this ill-advised course, there was nothing whatever in Ottoman law to prevent his doing so, and this without troubling to get his document of distribution "dressé en présence de témoins dignes de foi de sa nation," or "légalisé par le patriarche ou métropolitain ou évêque." In the third place, the Circular was from the first accepted as regulating wills, and not deeds of gift, and an express reference to it in this sense was embodied in the statute establishing the Μικτὸν Συμβούλιον in the following year (Art. 3). What is more, it was repeatedly invoked and recognised both by the administrative authorities and the Courts whenever the Orthodox privileges in regard to wills were called in question.[2]

Nevertheless, in 1890 (whether because it was felt that the looseness of phraseology of the Circular was dangerous, or because provincial "juges du chéri ou autres employés du Gouvernement" were taking advantage of this looseness of phraseology to deprive the Orthodox of their just rights)

[1] A further paragraph made express exception of domain and vaqf lands, in accordance with the principle explained above (see p. 132).

[2] See, for example, Vezirial Circular, 4 Rej. 1285 (October 6, 1868): "Le patriarcat des (Grecs) Roumais a annoncé par takrir que quelques-uns des cadis interviennent dans des affaires concernant la religion, telles que testaments. . . ." Vezirial Circular, 23 Cheval 1291 (November 20, 1874), which opens in similar terms, and proceeds: "Attendu que, quant aux testaments, ils sont indiqués dans la circulaire du 7 Sefer 1278, . . . les conditions d'après lesquelles ils seront considérés valables ou non" (Karavokyros, *Droit successoral*, pp. 153 *seq.*). So also when in 1875 it was enacted that gifts and legacies of *mulk* immovables could not be made without a judgment of the Sheri Court, this was recognised as being a derogation of the privileges accorded to Christians by the circular of 7 Sefer 1278, and in 1878 (14 Reb. II. 1295) was modified accordingly. (See also judgment of the Court of Cassation, 28 Zilhijje 1297, cited Karavokyros, Κλείς, p. 98.)

the Œcumenical Patriarchate seems to have thought it necessary to press the point upon the attention of the Porte.

The question was raised with several others (the enforcement of orders for alimony, the arrest and punishment of the clergy, the swearing of the clergy in Courts of Justice, the management of the Orthodox schools, and the issue of berats to Bulgarian exarchs) in a long and impassioned controversy in the course of which the Œcumenical Patriarch three times tendered his resignation.

The course of the controversy in regard to wills was as follows: In reviewing the Christian privileges the Minister of Justice referred to wills as being governed by the Circular of 7 Sefer 1278 (July 25). The Patriarch in reply drew attention to the words which seem to require actual delivery of bequests, and pointed out that such a condition was utterly foreign to the idea of a will as known among Christians (August 2). This observation apparently made no impression on the Minister of Justice, for in his reply he took no notice of it (August 11). Accordingly the Patriarch reiterated the point with more emphasis (August 21). A will among Christians has a religious character (ἡ διαθήκη τῶν Χριστιανῶν εἶναι θρησκευτικόν). The necessity of making delivery of the bequest in the lifetime of the testator is utterly fatal to the very object and nature of a will (ἄρδην καταστρέφει τὸν σκοπὸν καὶ τὴν οὐσίαν τῆς διαθήκης παρὰ τοῖς Χριστιανοῖς). Being of a religious character, a Christian will must be governed by its own law (ἡ διαθήκη τῶν Χριστιανῶν ἀφ' οὗ εἶναι θρησκευτικόν, πρέπει νὰ καταρτισθῇ κατὰ τὴν περὶ ταύτης θεσμοθεσίαν).

Still the Minister does not appreciate the point, and in his reply proceeds rather to discuss the question whether a will is a civil or a religious matter. It seems that he has been making inquiries on the subject of the *quotité disponible*, and he finds that in Germany, Austria, France, and Roumania it varies with the local law. So also it must be governed by the local law in Turkey, which limits it to one-third. On the other hand a special law, the Circular of 7 Sefer 1278, authorises Christians to exceed that limit, and submits their wills to the certification of their own religious authorities (October 2).

For a third time the Patriarch put the point (December 22) that the document contemplated in the Circular of 7 Sefer 1278 was of the type of a gift and not of a will (ἔχει τύπον μᾶλλον δωρεᾶς ἢ διαθήκης). A perusal of the correspondence leaves upon the mind the impression that to the last the Minister of Justice was unable to see any defect in the Circular of 7 Sefer, but he was finally induced to include in the Circular which adjusted this and all the other kindred difficulties a general statement that whatever an Orthodox Christian bequeathed by his will (not being vaqf or domain lands) should be left to the legatees as he bequeathed it, that the validity of the will should be determined by the ecclesiastical tribunals of the community, and that all disputes arising out of the will and affecting only members of the community should be determined by these same tribunals.

This Circular[1] was issued on February 3, 1891, but the actual final decision of this and the other points of controversy was announced, by special request of the Patriarch, on Christmas Eve, 1890, and celebrated throughout the Empire with "Te Deums."

Such is the history of the privileges of the Orthodox inhabitants of the Turkish Empire—except Cyprus. The Cyprus Church is autocephalous, and is not subject to the Œcumenical throne. Moreover, when Mohammed the Conqueror accorded these historic privileges to the Patriarch Gennadius Scolarius, Cyprus was still unconquered, and still under the Lusignans. The story of the position of this question in Cyprus at the commencement of the British occupation, and of the peculiar development which, so far as wills and successions are concerned, it has since undergone, is excluded for reasons of space from the present article. I trust, however, that I may be permitted to resume the subject in a later number.

[1] The text of the material paragraph is as follows: "Les affaires ayant trait aux testaments, *bien que celles-ci soient d'ordre civil*, ainsi que l'examen et l'aplanissement des différends qui s'y rapportent, sont confiés au susdit Conseil Mixte en vertu de l'Art. 3, chap. II; et le testament d'un Chrétien, ayant des héritiers mineurs, ou majeurs, sera valable judiciairement, lorsqu'il est légalisé par le Patriarche, un Métropolitain, ou un évêque. Les biens meubles (*mal*) et les immeubles (*mulk*) légués par le testament, mais pas les terres domaniales (*erazi mirie*) et les biens dédiés (*vakoufs*), seront laissés au légataire sans aucune immixtion."

THE MEASURE OF DAMAGES IN ACTIONS OF MARITIME COLLISIONS.[1]

[*Contributed by* E. S. Roscoe, Esq., *Admiralty Registrar.*]

The primary object of the work here referred to is to facilitate the labours of professional persons—lawyers, average adjusters and the like. Its publication, however, has a somewhat wider interest, since it enables a view to be obtained of the manner in which damages arising from collision at sea are assessed under five separate systems—of England, Scotland, France, Germany, and the United States. The first point which stands out is that the principles of assessment have been more systematically elaborated in England than in any other country, for the reason that the practice of the Admiralty Court is more clearly defined. The Judge of the High Court of Admiralty decided only the liability for a collision, and the damages were referred to the Registrar and Merchant for assessment. From the decision or report of the Registrar an appeal lay to the Judge, and before the Judicature Act of 1873, from the Judge to the Privy Council. The same kind of procedure under somewhat different conditions still continues, though the old Court of Admiralty is now absorbed in the High Court of Justice. In Scotland the claimant should primarily prove his damages at the trial, but the proof of damages is so completely separate in principle and fact from proof of liability for a collision, that in practice the assessment is generally referred to an expert. Consequently the decisions on damages in Scotland are in fact mere arbitrators' awards unknown to the legal profession and carrying no judicial weight.

In France it may be said, in short, that the procedure is the same as in Scotland. As the Court is primarily the tribunal by which damages should be assessed and even for the same reasons as affect procedure in Scotland, "il nomme un ou plusieurs experts" (p. 127). Therefore in France there is some obscurity in regard to actual awards, though from time to time the several Tribunals of Commerce have given decisions on points arising on the measure of damages. But it has to be borne in mind that the several

[1] *The Measure of Damages in Actions of Maritime Collisions.* By E. S. Roscoe, Barrister-at-Law, Admiralty Registrar of the High Court of Justice. With notes of American Cases, and epitomes of the Law of Scotland by John A. Spens, France by Leopold Dor, and Germany by Dr. O. Schroeder. Also some unreported judgments and Registrars' Reports.

local tribunals are separate and independent of each other, and that one Court is not bound by the decisions of another, though the decision of one Court may be used to guide the judgment of another. Consequently there cannot in France be a series of decisions—as in England—applicable to all cases, forming in effect a judge-made code of one branch of the law of maritime damages, thus exemplifying the effect of procedure on the instance of municipal law. Nor does its effect stop here, since by the elucidation of subsidiary principles applicable to frequently occurring facts shipowners and underwriters of whatever nationality can judge to some extent of their rights and liabilities in case of loss of or damage to ships by collision.

If we turn from procedure to substantive law, one finds, as was to be expected, that the same main principle is the basis of the law in all countries. This principle has in Admiralty decisions been succinctly called *restitutio in integrum* with a view of denoting that the Court would, if possible, "place the innocent party in the same pecuniary position as if no injury had been done to him" (p. 5). But the moment that the application of this principle to concrete facts in different countries is examined, we frequently find startling differences. Thus, in regard to the amount of damages in respect of loss of time suffered by a vessel in consequence of a collision, English law has now elaborated a workable set of rules, the basis of which is that the damages should be based on evidence which shows as near as may be what the vessel was earning at the time of the collision. But in France the Court, other than that of Marseilles, "are inclined to allow a fixed rate of so much per day." But these tribunals differ as to this fixed rate. In England up to about the year 1876, the fixed rate per ton per day may be said to have been the usual standard, but any such inflexible figure is obviously unjust and archaic, so that both from a theoretical and practical point the French tribunals are some thirty years behind those of England.

Again it has now been settled by the Court of Appeal that when a total loss of a ship has occurred which was already fixed for employment, the freight less deductions may be recovered by the owner of the lost ship. In this respect English law has advanced during recent years, since before the decision in the *Kate* and in the *Racine*, interest only in the value of the ship from the date of loss to the date of payment was given. In France the law does not seem to recognise such loss of freight, in other words it is regarded, as Dr. Lushington regarded it, as being too remote. A detailed examination of differences and likenesses in several systems of law, whether European or American, lead to discussion, commercial rather than legal. There is, however, sufficient approach among the several systems grouped in this work on Maritime Damages to show that it would not be impossible, and in many respects not difficult, by means of comparatively simple legislation, to produce a common international agreement upon the main point of these damages. Facts, though they differ from time to time in regard to loss from collision at sea, yet naturally are

frequently repeated in similar form. A vessel over and over again is lost when under charter and in respect of which a second charter has been concluded. It is true that this second charter is in principle no more than first-rate evidence of a probable profitable employment of the lost ship in the near future. But it is evidence which so constantly recurs that a decision of the Court of Appeal having been given on one set of facts, such a decision becomes a governing practical rule. Once such a rule is made, and is fixed in one jurisprudence, and is used in cases of ships of all countries seeking justice in the Courts of that country, then it becomes desirable that it should be inserted in other national systems, so that owners of vessels passing from one national port to another will in case of appeal to natural tribunals be treated alike in every civilised country in the world. It cannot be doubted that such a common system, whether by means of international agreement or by the insertion of similar portions of law in different systems of legislation, would be an immense practical convenience to the international commercial community, and it is for this community that maritime law exists. That this is no mere Utopian idea is obvious from a perusal of the work mentioned at the head of this article, in which have been grouped, necessarily in some instances imperfectly, the principles and applications of the law relating to damages arising from collisions at sea.

THE LAW AS TO COMBINATIONS.

THE Report of the Royal Commission on Shipping Rings contains two papers on "The Law as to Shipping Conferences and Deferred Rebates," the one by the Right Hon. Arthur Cohen, K.C., the Chairman of the Commission, and the other by Sir John Macdonell, which may afford a general survey of a peculiarly complex and difficult subject.

MEMORANDUM BY THE RIGHT HON. ARTHUR COHEN, K.C.

IN the great majority of trades carried on by sea carriage combinations of shipowners, sometimes called Conferences or Rings, have established the so-called system of "Deferred Rebates." According to this system the shipowners require the shipper to pay a certain amount of freight for the carriage of goods, but undertake at the same time to return, after the lapse of a definite period, a certain fixed portion of that amount, provided that he has not directly or indirectly shipped any goods by outside vessels, that is to say, vessels not belonging to the Conference Lines. The portion of the freight thus retained for a certain time and ultimately returned to those shippers who have fulfilled the prescribed condition is called a "deferred rebate," but it would be more accurate to describe it as a "conditional deferred rebate," inasmuch as the right to it is forfeited by those shippers who directly or indirectly ship goods by outside vessels.

The effect of the rebate system is that the shipowners always have in hand a considerable sum of money which the merchant forfeits if he has in any single instance during a certain period shipped goods on a vessel not belonging to the Conference Line. Thus the object of the rebate system is to induce or oblige merchants to ship goods exclusively on vessels belonging to the Conference, and in that way to secure for a combination of shipowners a virtual monopoly in the carriage of merchandise between certain ports. A legal question might, therefore, seem to arise whether the rebate system is not illegal at common law, as being in undue restraint of trade, or tending to create a monopoly. This question is, in my opinion, one of very great difficulty and doubt. It was not (as is supposed by many persons) solved in the celebrated *Mogul* case. That case only decided that an action of conspiracy could not be maintained by the plaintiffs, because the defendants did not by entering into the

contract under consideration render themselves guilty of a criminal conspiracy. But on the question whether the contract was void and illegal, because it was in undue restraint of trade or unduly impeded free competition, there was the utmost diversity of opinion both among the Judges and the noble and learned Lords.

One passage, however, from the opinion delivered in the *Mogul* case by the late Lord Bramwell is, for many reasons, worth quoting: "Public policy," said Burrough J. (I believe quoting Hobart C.J.), "is an unruly horse and dangerous to ride." I quote also another distinguished Judge, more modern, Cave J.: "Certain kinds of contracts have been held void at common law on the grounds of public policy; a branch of the law, however, which certainly should not be extended, as judges are more to be trusted as interpreters of the law than as expounders of what is called public policy." "I think," continues Lord Bramwell, "the present case is an illustration of the wisdom of these remarks. I venture to make another. No evidence is given in these public policy cases. The tribunal is to say, as matter of law, that the thing is against public policy, and void. How can the judges do that without any evidence as to its effect and consequences?"

Three things are to be especially noted. First, our Courts are to a very great extent bound by decisions pronounced in times when the commercial and social systems of this and other countries were essentially different from those which now exist. Secondly, our Courts are not at liberty to invent or give effect to any new ground of public policy (see on this point the judgment of Lord Halsbury in the important case of *Janson* v. *Driefontein Mines, Ltd.*, 1902, A.C. 484). Thirdly, our Courts would not admit any evidence as to the effect which the rebate system produces or is calculated to produce on our shipping interests or on our vast and complicated international trade, whereas the main object and purpose of this Commission is to collect and consider all the evidence that can be procured on this important subject. For instance, if it were proved to our satisfaction that the fact of the rebate system being illegal in England, whilst legal in Germany, would have the effect of materially injuring British industry and commerce, it might be our duty to report that, in the circumstances, the rebate system was not contrary to public policy and ought to be legally sanctioned, even *if we were of opinion* that it was illegal according to the principles of our ancient common law. On the other hand, although we were of opinion that the rebate system was not illegal at common law, yet if it were proved by the evidence adduced before us that it was detrimental to British trade, we might be obliged to recommend that the system should be abolished by statute. For these reasons I think it unnecessary for us to solve the difficult legal question whether the rebate system is or is not illegal at common law.

There is, however, another legal question of the utmost practical

importance which emerges in connection with this subject. It is this: Can the shipper recover the rebate in the event of his having shipped goods by an outside steamer? I am of opinion that he could not, even if the contract made under the rebate system were held to be illegal because against public policy. The shipper has paid the freight under no mistake of fact, nor under undue influence. Now it is, in my opinion, established law that the only cases in which a person who has paid money under an illegal contract, which is executed as distinguished from merely being executory, can recover the money so paid, are the following:

(1) When he has made the payment under a mistake of fact.

(2) Where he has made the payment under undue influence, or has been induced by fraud to enter into the contract.

(3) Where payment has been made under an agreement which a statute has prohibited with a view of protecting those persons who may enter into such agreements. (See the judgment of Lord Justice Collins in the very recent case of *Harse* v. *Pearl Life Assurance Company*, at p. 563, 1904, 1 K.B.)

In my opinion, it is clear that the shipper under the rebate system does not fall within any of these three cases, and, therefore, could not recover the rebate, even if the agreement under the rebate system was void and unlawful.

It is because this has been the view generally taken by lawyers that no shipper has ever maintained an action against the shipowner to recover the retained rebates, and that the rebate system is so formidable a weapon in the hands of the Conference Lines.

Moreover, it is, in my opinion, clear from the *Mogul* case that no civil or criminal proceeding could be maintained against a Conference on the ground that it is so formed as unduly to restrain trade and prevent free competition.

Bearing the above considerations in mind, it is, indeed, difficult to see how in any legal proceeding the question whether the rebate system is or is not contrary to public policy can ever present itself directly for the decision of our Courts.

I am convinced it is impossible to give in a few pages a complete and accurate exposition of the English law as to combinations which are in restraint of trade or unduly impede free competition or employment so as to deduce from the numerous and conflicting cases clear and definite principles. No doubt the subject is one of great interest to lawyers and jurists. But for reasons already stated, I think the rules of the common law, even if they could be ascertained with reasonable certainty, would be of little or no use in the important practical inquiry on which we are engaged.

The important practical conclusion to which we have been led is the following. Even if the rebate system is in the eye of the common law

illegal, it would be impossible for the merchant to recover the rebate from the shipowner, and therefore if public policy requires the abolition of the rebate system, this can only be effected by a statutory prohibition, and by imposing penalties on those who are a party to that system; in other words, some enactment similar to the American Sherman Act would be necessary.

I will now proceed to make some comments on Sir John Macdonell's memorandum.

As regards paragraphs I., II., III., and IX., it will appear from this, and my former memorandum, that the views of Sir John Macdonell and myself perfectly agree.

As regards paragraphs IV. to VIII., I do not entirely agree with the views put forward, with so much learning, in these paragraphs, but I shall abstain from discussing them, because, for reasons already fully stated, I think it unnecessary for the Commission to perplex itself with the difficult question whether at common law the system of deferred rebates would be illegal.

As regards paragraph X., I desire to make the following observations, which show that the American law as to the liability of shipowners differs essentially from English law:

The English law relating to the shipowners' liability for the safe carriage of goods may, with sufficient accuracy for the present purpose, be stated in the following manner:

It is established by *Nugent* v. *Smith*, 1 C.P.D. 423, and other cases, that a shipowner's liability at common law is the same as that of a common carrier. In the absence, therefore, of any express stipulation to the contrary, the shipowner is bound to carry the goods safely and deliver them at their port of destination in the condition in which they were shipped, and he is responsible for loss or damage that may happen to them while in his possession as carrier, unless such loss or damage has been caused by an act of God, the King's enemies, or by the vice of the goods, that is to say, by qualities inherent in them, or by some defect in the mode in which they were packed and delivered to the shipowner.

A shipowner also impliedly warrants that his vessel at the commencement of the voyage is seaworthy for the carriage of goods, that is to say, reasonably fit in all respects to carry them to their destination, and is liable for any loss or damage resulting from the breach of such warranty.

Finally, where a contract of affreightment exempts a shipowner from liability for loss or damage arising from specified causes, there is an implied undertaking on his part that due diligence will be exercised by himself, the master, and crew, to avoid loss or damage arising from such excepted causes.

The shipowners' liability at common law is, therefore, of a most stringent character. This liability, however, may be limited by express contract

between him and the shipper, and, according to English law (at any rate, since the year 1832), it may be diminished *to any extent whatsoever*, the shipowner and shipper being at liberty to make any contract they please with each other. (As to the law before 1832, see Mr. Justice Blackburn's opinion, delivered in the House of Lords in *Peek* v. *The North Staffordshire Railway Company*, in 32 L.J. Q.B. at p. 246.)

A stipulation, therefore, exempting the shipowner from liability for loss occasioned by the unseaworthiness of the ship, or by the negligence of the master and crew, and even from liability for loss occasioned *by any cause whatsoever*, is perfectly valid and binding.

Such is, undoubtedly, the existing law of England, but such is not the law of the United States; for it has been decided by the Supreme Court of the United States, in *The Railroad Company* v. *Lockwood*, 17 Wallace 357, and in *The Liverpool Steamship Company* v. *The Phœnix Insurance Company*, 129 U.S. 397, that any clauses exempting the shipowner from liability for his own negligence or that of his servants are void as being contrary to public policy.

I need scarcely say that the Carriers Act referred to by Sir. J. Macdonell does not apply to persons or companies who are only carriers by sea, and has no application whatever to carriers by sea.

According, then, to English law the shipowner's liability is, in the absence of agreement to the contrary, that of a common carrier, which is substantially the same as that of an insurer of goods. A merchant can indeed require the shipowner to carry his goods as and with the liability of a common carrier, on tendering to him a reasonable freight. In fact, however, no merchant ever desires or requests his goods to be carried on those terms, and would never tender the proper freight for that purpose. It follows that the shipowner can by English, though not by American, law exempt himself by the contract of affreightment from any liability from the loss of or damage to goods.

As regards paragraph XI., the case of railway companies stands, in my opinion, on an entirely different footing from that of shipowners. The liability of the former is regulated almost entirely by statute law, and is founded on considerations, very few, if any, of which in my opinion are applicable to the case of shipowners.

As regards paragraph XII., I think it may be useful for me to refer at some length to the evidence we have obtained on the law of Germany, America and other countries.

1.—As to American Law.

As regards paragraph XII. of Sir John Macdonell's memorandum, I desire to make the following observation:

Mr. Robert Newton Crane, a member of the Bar of the Supreme Court of the United States, and also a member of the English Bar, who has had

very great experience in connection with American law, appeared before us to give information as to the American law relating to the system of deferred rebates.

Two propositions are, from the very words of the Statutes, perfectly clear: First, the Inter-State Commerce Act, 1887, and the amending Acts, namely, the Elkins Act, 1903, and the Hepburn Act, 1906, have no application to persons or companies who are only carriers by sea. They, therefore, do not affect shipping Conferences nor the rebate systems introduced by these Conferences. Secondly, the Statutes have for their main object to prevent discrimination and preferences, and are not aimed at monopolies.

There is, however, an American Statute, known as the Sherman Act, 1890, which does not apply to persons and companies who are only shipowners. The 2nd and 7th and 8th sections are as follows:

S. 2.—Every person who shall monopolise, or attempt to monopolise, or combine or conspire with any other person or persons, to monopolise any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanour, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the Court.

S. 7.—Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this Act, may sue therefore in any circuit Court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover therefold the damages by him sustained, and the cost of the suit, including a reasonable attorney's fee.

S. 8.—The word "person" or "persons" wherever used in this Act shall be deemed to include corporations and associations existing under or authorised by the laws of either the United States, the laws of any of the territories, the laws of any State, or the laws of any foreign country.

It seems clear that the object and effect of the system of deferred rebates is to give the Conference Lines a virtual monopoly in particular trades; it may be true that this monopoly is founded on reasonable considerations, and is not injurious to the business of shipowners and merchants, but it was held by a majority of the Supreme Court in the important case of *The United States* v. *The Trans-Missouri Freight Association*, 166 U.S. 290, that the Sherman Act applies equally to all contracts tending to create a monopoly, *whether or not they are reasonable or whether or not they are unlawful at common law.*

On these grounds Mr. Crane was clearly of opinion that the system of deferred rebates would violate the provisions of the Sherman Act.

Mr. Newton Crane summed up his views in the following words: "A contract embodying a system of deferred rebates if made in the United States, or even if made out of the United States, and affecting the commerce

or trade of the United States, would be illegal under the Sherman Act, and would subject those who made such a contract to the penalties imposed by the Act, provided an action was instituted to recover such penalties in the United States and the Federal Courts had jurisdiction of the parties."

To discuss the various American decisions as to the common law relating to combinations in restraint of trade or in restriction of free competition would be a tedious and, in my opinion, a useless task. Most of them are collected by Mr. Eddy in a work consisting of more than 1,330 pages, but they are so conflicting that it is quite impossible to deduce from them any clear or definite principle. Moreover, it seems to me unnecessary to attempt to do so on account of the aforementioned decision in the Trans-Missouri Freight case.

It may, however, be proper to refer to two cases which were brought to our notice by some of the merchants who gave evidence before us :

The first case is *Thomsen* v. *Union Castle Mail Steamship Company*. On reading this case carefully, it will be found that it by no means decides that the rebate system is not a violation of the Sherman Act. The action was brought to recover damages under the aforementioned 7th section of the Sherman Act. The *only point decided* was that the plaintiff could not maintain the action because he could not prove any damages; but it is not unimportant to note the following passage of the judgment of the learned Judge who tried the case: "If this case had been promoted by the United States or even by a shipowner, who, by the combined action of the defendants had been prevented from freely engaging in commerce between New York and South Africa, I think very different questions would have been presented for consideration." [1]

The other case to which our attention has been presented is the very recent case of *The Cosmopolitan Shipping Company* v. *Hamburg-American Company and others.* This action was brought under the Elkins Act before the Inter-State Commission, and it was held that "that Commission had no jurisdiction as to shipments moving from ports of the United States to a foreign country not adjacent when such shipments are not carried by rail, or by rail and water, from an inland point of origin to a port of transhipment. An inland movement of export or import traffic is a condition precedent to the attaching of jurisdiction." It is clear, therefore, that the case in question did not and could not decide that the rebate system was not a violation of the Sherman Act.

We have however been furnished, confidentially, with a very able opinion, recently written by an eminent American lawyer, to the effect that a system of deferred rebates, the terms of which are reasonable, might be held not to violate the provisions of the Sherman Act. This opinion is founded upon

[1] Since this memorandum was written, the judgment in *Thomsen* v. *Union Castle Mail Steamship Company* has been reversed in the United States Circuit Court of Appeal.

the following considerations. It appears that some distinguished American lawyers are of opinion that the Sherman Act applies only to contracts or combinations, which are illegal under the common law as understood in the United States, and there are some very recent American cases, the principal of which are known as the Whiskey cases, pointing to the conclusion that the system of rebates does not violate the principles of the common law.

Although I am not at all convinced of the correctness of this opinion, and agree with that expressed by Mr. Newton Crane, still the question whether the rebate is illegal under the Sherman Act cannot perhaps be considered as entirely free from doubt.

2.—On German Law.

The Commission obtained from Sir William Ward, His Majesty's Consul-General at Hamburg, a report on the German law relating to Shipping Rings and the system of Deferred Rebates. This report, which is set out at page 212 of Part III. of the Appendices, contains the following passage: "In Germany no laws or regulations have been passed for the purpose or with the effect of regulating or repressing Shipping Rings or Conferences, and the action of shipping companies combining together in order to safeguard their interests, that is to say, in order to maintain rates of freight at a certain figure for a fixed period, and their action which consists in granting rebates on freights to regular shippers, without whose support they could not exist, is regarded as perfectly lawful."

We also examined Mr. Ernest Schuster, a barrister who has devoted much time to the study of German law and is recognised as a high authority on that subject.

He states that there has been no decision in the higher Courts in Germany declaring the system of rebates to be illegal, and he cited at least two decisions in which the legality of the system of rebates was affirmed, one in 1906 by the Hanseatic Court of Appeal, the other in 1907 by the Imperial Court of Leipzig, the highest Court of Appeal in Germany.

Mr. Schuster, however, directed our attention to s. 826 of the German Code, which enacts that "any person who in a manner *contra bonos mores* inflicts damage upon another is bound to compensate such other in respect of such damage," and he states that this is the only enactment which has any bearing upon Shipping Rings. Notwithstanding the two decisions above referred to, the Court would, in his opinion, take into consideration the terms of the rebate system in any particular case, and that these might be so oppressive and inequitable that the Court would hold them to be *contra bonos mores* within the meaning of the Code.

In one of the cases decided by the German Courts it was expressly laid down that "the fact of the Association of Shipowners attempting to monopolise the trade to certain ports was irrelevant to the question whether the granting of rebates was justifiable or not." Mr. Schuster, however, was

of opinion that the mode by which the monopoly is sought to be attained in any particular system of rebates might be considered by the German Court so oppressive and inequitable that they would hold it to be *contra bonos mores* within s. 826 of the Code. He concluded his evidence by saying that a current of public opinion set in some time ago which was very much opposed to all trade combinations of any sort, and that this current of public opinion had had considerable influence upon the Courts, but that the current of public opinion was now moving in the opposite direction.

Although it is somewhat dangerous to express an opinion on foreign law, I venture to say, after a careful study of the German cases cited by Sir William Ward and Mr. Schuster, that I have come to the conclusion that the several systems of rebates which have been brought to our notice would not be held by the German Courts to be illegal by reason of their being *contra bonos mores*, nor for any other reason. Indeed there is no reason to believe that the terms of the rebate system which were the subject-matter of the two cases in which those systems were held to be lawful differed in any substantial degree from the terms of the rebate system which have been brought to the notice of this Commission.

3.—The Law of France.

From information obtained from the British Embassy at Paris it appears that there is no decision of the French Courts declaring the illegality of the system of rebates, and that most probably such systems of rebates which have been brought to our notice would not be held by those Courts to be illegal.

4.—Russian Law.

We are informed by the British Commercial Agent in Russia that, as far as he can gather, no provision is made in regard to existing legislation against Shipping Rings, rebates, or discrimination. They are not considered illegal or void as against public policy, and are not unfavourably looked upon by the local or other authorities.

As regards paragraph XIII. of Sir J. Macdonell's memorandum: amongst the questions which are somewhat briefly considered in this paragraph, there is only one which, from my point of view, is of any importance to our inquiry. It is this: whether the Court of any country would enforce penalties imposed by the laws of another country upon persons who are parties to a system of deferred rebates, and I entirely agree with Sir John Macdonell that this question must be answered in the negative.

On the whole I am very glad to find that though I do not agree with every part of Sir John Macdonell's memorandum, we do not differ on any points which are, in my opinion, essential to our inquiry. The main objects of my memorandum are to show, first, that the Commission need not and

should not perplex itself with the problem whether the systems of rebates, such as has been brought to our notice, are or are not illegal because contrary to public policy as conceived by the common law of England. Secondly, as the rebates are not recoverable, whether or not the rebate system be illegal, the real question is whether that system should be abolished by statute by making the parties to it liable to penalties and a criminal prosecution. Thirdly, that those penalties would not be enforced by a foreign Court. Fourthly, that according to the law of Germany such systems of rebates as have been brought to our notice are legal, and probably that according to the law of America they are illegal under the Sherman Act.

MEMORANDUM BY SIR J. MACDONELL.

I.—Purpose of the Memorandum.

This memorandum is written with recognition of the fact that the questions for the Commission to report upon are not legal; they are: (1) Questions of fact as to Conferences generally and deferred rebates, to be determined on the evidence; and (2) in the event of certain answers being given to these questions, there are, it may be, further questions as to how the existing law should be altered. I agree with the remark of the Chairman respecting the deferred rebate agreement, one of the subjects of investigation, that "the main duty of the Commission is to inquire independently of what may be the existing law on the subject, whether the agreement is to such an extent contrary to public policy and detrimental to British commerce that it ought to be either absolutely prohibited, etc. But in the course of the evidence several legal questions have arisen. Misconceptions which require to be removed exist as to some of them; and it may be desirable in these circumstances to deal with them.

II.—Recovery of Deferred Rebates.

The deferred rebate retained by the shipowners is occasionally spoken of by shippers as "our money"; the belief of some persons, apparently, being that they could, if they would, recover the 5 or 10 per cent. or other deferred rebate by process of law, though they had not complied with the conditions mentioned in the rebate circular. I agree with the Chairman in thinking this to be erroneous. The shipping of goods by the owner or his agent with full knowledge of the terms of the circular creates a contract. Either the contract is not contrary to public policy and valid, or it is contrary to public policy and invalid. If it is the former, the rebate cannot be recovered unless the conditions on which it is promised are fulfilled. If it is the latter, the maxim *in pari casu melior est conditio defendentis* applies. The rule takes effect that if two parties enter into an illegal contract, and money is paid under it by one of the two, it may be recovered before the

contract is acted upon, but not afterwards. Thus, a policy on an illegal voyage cannot be sued upon. But the premium cannot be recovered after the risk has commenced. In other words, if the person seeking to recover relies upon the contract which he alleges to be invalid and which he has acted upon—if the contract is executed and not executory—he cannot recover. There are exceptions to the above rule, it is true; *e.g.* where there has been practically coercion, oppression, or conduct akin thereto (*Atkinson* v. *Denby*, 6 H. & C. 778; *Smith* v. *Cuff*, 6 M. & S. 160; *Harse* v. *Pearl Life Assurance Co.*, 1904, 1 K.B. 558). But none of these exceptions seem to apply to the contract as to deferred rebate.

In construing a somewhat similar contract, certain American Courts have held that the deferred rebate could not be recovered. The facts in one case (*Olmstead* v. *Distilling and Cattle Feeding Company* [1896], 77 Fed. Rep. 265) were these: The defendant Company, which manufactured and sold spirits, etc., issued to the purchasers of its goods rebate vouchers, by which, "subject to the conditions named herein, and for the purpose of securing the continuous patronage of the within-named purchaser and successors and assignee of the same, for its products," the Company, "six months from the date of this purchase voucher, will pay, etc., a rebate of 5 per cent. per proof gallon on 329½ proof gallons of the defendant Company's product purchased this day." "This voucher will be valid and payable only on condition that the above-named purchaser, the successors and assignees of the same, from the date of this voucher to the time of its payment, shall have bought their supply of such kind of goods as are produced by the Distilling and Cattle Feeding Company, and all compounds thereof, exclusively from one or more of the dealers named on the back hereof, until further notified, and shall also have subscribed to the certificate on the back hereof." Claims were made by assignees of persons who had not bought from the defendant Company or their distributors, and who had not fulfilled the conditions as to six months' patronage. Nevertheless, they claimed to recover the rebate, the conditions being, they alleged, illegal as in restraint of trade or against the Federal or State statutes. The Court held that, if the contract was illegal, the claimants could not recover; it was not an executory contract. "If the condition be illegal and void, obviously the voucher fails entirely. In that case there can be no obligation on the voucher to pay anything, and the action, so far as it rests on the promise in that instrument, necessarily fails." As to a contention that the defendants were bound to sell, and at a reasonable price, the Court said that, if the contract were legal, "Steins Bros. were not bound to buy from the Company's distributors during the six months which followed October 22, 1891; but if they did, the tender, as a term of the sale contract, of a further rebate voucher, conditioned on future patronage, was not excluded by implication" (p. 269).

It is submitted that the reasoning of this judgment applies to any claim for deferred rebate by a shipper who has been "disloyal"; and that a

shipper who had not complied with the terms of the circular could not recover the rebate, even if the shipowner had violated the terms of the "compact."

Different considerations might apply if, while the payment of the rebate is suspended, the rates of freight were raised; it might, perhaps, be urged with some force that in the wording of some of the rebate circulars there was an implication that the rates would remain the same.

III.—Legal Effect of Rebate Circular and Compact.

As to shippers of goods who shipped them after receiving the rebate circular or with knowledge of the same, it is conceived that this would form a contract embodying, unless inconsistent, the terms of the bill of lading.

A question has been asked as to the effect of the "compact" dated March 9, 1893. It may be urged that in the case of those to whom that document is communicated it creates a contract. But it might be very difficult for a particular shipper to prove that notice of such "compact" was given to him. Further, the "compact" is very vague and uncertain, *e.g.*:

(*a*) The meaning of Clause 4 is not clear;

(*b*) The shipowners are to judge when an increase of rates of freight shall take place;

(*c*) They might modify the terms at any time by altering the bill of lading;

(*d*) The provision as to no cargo being taken on ship's account is ambiguous; the parties are probably never exactly *ad idem*.

On the whole, it may be very much doubted whether a shipper could, in any circumstances, sue a shipowner for breach of the "compact."

IV.—Restraint of Trade.

The existing English law as to restraint of trade has been developed not by abstract reasoning or deductions from certain principles, but with reference to questions as they came before the Courts. It has been worked out with minuteness in certain aspects; it is silent or vague and ambiguous as to questions which have only lately arisen, or which have only lately become important. It is tolerably complete and intelligible as to the interests of private persons; it is imperfect, undeveloped, and doubtful as to the interests of the public. The governing principle is to be found in a series of decisions of which the earliest for present purposes is *Mitchell* v. *Reynold*, 1 Sm. L.C., 9th ed. 430. In that case and in later cases the following principles were laid down: That all contracts in general restraint of trade are illegal in the sense of not being enforceable, but that agreements in partial restraint of trade, if for consideration, are valid, provided that the restraint is reasonable, in the sense that it is such as is reasonably necessary for the protection of the person who seeks to impose restraint (covenantee).

The majority of the questions as to restraint of trade which have come before the Courts relate to contracts by which persons agree not to carry on business or profession for a certain time within a certain area; and to them the above rule has been applied. In 1893 there was an important development of the law. It had been stated by text writers and judges (though in *Rousillon* v. *Rousillon* [14 Ch. D. 351] Fry J. took a different view) that the restraint, in order to be valid, must be limited as to the area and space within which it operated, and that if not so limited it was necessarily void. This opinion was declared to be erroneous by the decisions of the Court of Appeal and House of Lords in *Maxim Nordenfelt* v. *Nordenfelt.* In the case before the Court, the parties had entered into an agreement by which the patentees and manufacturer of guns and ammunition covenanted with a company to which lands and business had been sold, that he would not for twenty-five years either directly or indirectly, except on behalf of the company, carry on business as manufacturer of guns and ammunition. The covenant was unrestricted as to space. The judge of first instance, relying upon the decisions as to limitation of space, held the covenant void. This was reversed by the Court of Appeal (1893, 1 Ch. 630).

"General restraints," said Lord Justice Bowen in the *locus classicus*, "or, in other words, restraints wholly unlimited in area, are not, as a rule, permitted by the law, although the rule admits of exceptions. Partial restraints, or, in other words, restraints which involve only a limit of places at which, or persons with whom, or of modes in which, the trade is to be carried on, are valid when made for a good consideration, and where they do not extend further than is necessary for the reasonable protection of the covenantee" (p. 662). "The rule as to general restraint of trade ought not, in my judgment, to apply where a trader or manufacturer finds it necessary, for the advantageous transfer of the goodwill of a business in which he is so interested, and for the adequate protection of those who buy, to covenant that he will retire altogether from the trade which is being disposed of, provided always that the covenant is one the tendency of which is not injurious to the public" (pp. 667, 668). That judgment was affirmed in the House of Lords, and for much the same reasons (1894, A.C. 538).

It may now be taken that the want of limit as to space is not necessarily fatal; the Courts will look at all the circumstances, and say whether the restriction is reasonable.

I have reason to believe that the law in some other countries is to much the same effect (Schuster's *Principles of German Civil Law*, 101 n.).

V.—Restricting Freedom of Action.

Here may be mentioned another class of questions suggested by the objection to the rebate system, that it deprives shippers of liberty of choice, inasmuch as they cannot deal with outside steamers except on pain of forfeiting their rebates. The Courts have insisted that every one shall be

"free" to carry on his business; that there shall be no interference with such "freedom"; that the community is interested in maintaining this "freedom." To quote the statement of the law on this subject by Lord Justice James (then Vice-Chancellor): "Public policy requires that every man shall be at liberty to work for himself, and shall not be at liberty to deprive himself or the State of his labour, skill, or talent, by any contract that he enters into" (*Leather Cloth Co.* v. *Lorsent*, 1869, L.R. 9 Eq. 345). Erle C.J. (*Law relating to Trade Unions*, p. 12) expresses the doctrine thus: "Every person has a right under the law, as between him and his fellow subjects, to full freedom in disposing of his own labour or his own capital according to his own will. It follows that every other person is subject to the correlative duty arising therefrom, and is prohibited from any obstruction to the fullest exercise of this right which can be made compatible with the exercise of similar rights by others." The Courts have not, however, always defined what they mean by this. Nor have they discriminated nicely between "coercion" and the existence of very strong motives of gain or the like to which ordinary persons generally yield. It is not always clear whether in saying that a person is "free," the Courts mean that he has been subject to no coercion or duress of any kind; or that he is "free" in the sense that he is a party to no agreement in any way restricting his labour; "free" in the sense that he has been coerced into no such agreement; "free" in the further sense that he is under no agreement which unreasonably restricts his labour or withdraws him from the service of the community.

The Courts have declared invalid contracts by which persons agree to carry on business in certain ways, but not according to their own discretion or judgment; to fix prices, hours of work, modes of conducting business according to the opinion of others; to surrender, as it is sometimes said, their freedom of choice as to matters in which the community is interested. The leading decision on this subject is *Hilton* v. *Eckersley* (6 E. & B. 47; 25 L.J. Q.B. 199), the chief facts of which were these: Certain millowners agreed to carry on their works in regard to wages, times or periods of engagement, hours of work, for twelve months in conformity with the resolution of a majority. This agreement was held to be invalid. The judgment of the Exchequer Chamber contained this passage: "The obligors to this bond have clearly put themselves into a situation of restraint. First, each of them is prevented from paying any amount of wages except such as the majority may fix, whatever may be the circumstances of the work to be done and his own opinion thereon. Secondly, they can only employ persons for such times and periods as the majority may fix on, however much the minority may deem it their interest to do otherwise. The hours of work, the suspending of work, partially or altogether, the discipline and management of their establishments is to be regulated by those others forming a majority, and taken from every individual. And all this for a fixed period of twelve months. All these are surely relations restraining each man's power of

carrying on his own trade according to his discretion for his own best advantage, and therefore are restraints on trade not capable of being legally enforceable" (6 E. & B., p. 75).

It is open to question whether this decision would be followed to-day. But on somewhat similar lines was the decision of the Judicial Committee in *Collins* v. *Locke* (4 A.C. 674) as to an agreement between four firms of stevedores at Melbourne who had parcelled out between themselves the stevedoring trade of that port. There was a provision that if the merchants loading the ships did not choose the party to the agreement who as between the parties to the agreement was entitled to do the stevedoring, no other party to the agreement was to do the work. "The covenant in such cases restrains three of the four parties to the agreement from exercising their trade, without giving any profit or benefit to compensate for the restriction to either of the four, whilst the combination they have thus entered into is obviously detrimental to the public, by depriving the merchants of the power of employing any of these parties, who are probably the chief stevedores of the port, to load their ships, unless in each case they employ the one of the four to whom the ship, as between themselves, has been allotted, however great and well-founded their objections may be to employ him" (p. 688).

VI.—Agreements to Raise Prices.

It is alleged that the effect of the deferred rebate is to enhance freights. English Courts have rarely in late years dealt with the question as to the validity of agreements which are calculated to raise prices of commodities or services, or which may have that effect, unless they are in restraint of trade. There has been a reaction, which, on the whole, still continues, against the policy once prevalent of interfering with such contracts by legislation and otherwise. On this subject there is much obscurity. There are expressions in writers of authority, though rarely in recent times, that any agreement to raise prices is invalid. Hawkins describes them as criminal (i. 644). On the Statute Book there were, until last century, many enactments intended to prevent this effect; and it is often uncertain whether in using such expressions the Courts refer to their statutory powers or to their jurisdiction at common law. All the statutes against regrating, forestalling, and engrossing—the old names for such operations—were repealed by 12 Geo. III. c. 71. Under the influence chiefly of Lord Kenyon, the Courts continued to hold that these offences, while ceasing to be statutory, were indictable at common law, and various prosecutions were successful. To put an end to such prosecutions was passed 7 & 8 Vict. c. 24, s. 1, which did away with the offences of "badgering," "engrossing," "forestalling," and "regrating." As to the former statute, it has been said: "This repealing statute contains in the preamble the statement that it has been found by experience that the restraint laid by several statutes upon the dealing in corn, meal, flour, cattle, and sundry other sorts of victuals, by preventing

a free trade in the said commodities, had a tendency to discourage the growth and to enhance the price of the same. This statement is very noteworthy. It contains a confession of failure in the past; the indication of a new policy for the future" (Fry L.J., in *Mogul Steamship Co.* v. *McGregor*, L.R. 23 Q.B.D. p. 629).

The statute was silent as to civil proceedings. It left undetermined the questions (1) whether such an agreement was between the parties thereto invalid; or (2) whether an action would lie at the instance of any one injured by such agreement.

There are cases which seem to show that such combinations are illegal in the sense of not being enforceable. In *Cousins* v. *Smith*, 13 Ves. 542 (1807), Lord Eldon held that a combination of wholesale grocers to purchase all imported fruit so that those who would not buy from them exclusively should not have any supply was "a conspiracy against the world at large and illegal." "This is not, according to the legal definition of the term, forestalling, much less regrating; still less monopolising; but in the consideration of a Court of Equity it contains the mischief of all three" (p. 546). This decision has been much criticised; it is described by Lord Justice Bowen as "not very intelligible" (23 Q.B.D. p. 619; see also Fry L.J., p. 632). I find a somewhat similar expression in *Urmston* v. *Whitelegg*, 1890, 63 L.T. 455, the material facts of which were these: Contract, by which members of a mineral water association agreed not to sell mineral water at a less price than 9*d*. per dozen, or such other price not being less than 9*d*. as the committee might from time to time agree. *Held*, a contract in restraint of trade. Day J. said: "The rule still obtains that combination, for the mere purpose of raising prices, is not enforceable in a Court of law" (p. 455). But this dictum is very questionable; and there are such cases as *Elliman* v. *Carrington* (1901), 2 Ch. 275, which seem opposed to this doctrine. That was an agreement not to sell goods for less than specified prices; the buyer being bound to sell to his customer on similar terms. It was held that an action lay upon such an agreement; it was not in restraint of trade. So in *Jones* v. *North* (L.R. 19 Eq. 426), it was held that there was nothing illegal in an agreement between owners of quarries that they "will sell as between themselves at a certain price, leaving one of them to make any other profit that he can" (p. 430). There are, too, remarks in *Collins* v. *Locke* (4 A.C. 674) opposed to the view that Courts will necessarily regard an agreement which may enhance prices as illegal. "The objects which this agreement has in view are to parcel out the stevedoring business of the ports among the parties to it, and so to prevent competition, at least among themselves, and also, it may be, to keep up the price to be paid for the work. Their lordships are not prepared to say that an agreement having these objects is invalid if carried into effect by proper means, though the effect of them might be to create a partial restraint upon the power of the parties to exercise their trade" (p. 685).

In modern times, at all events, the English Courts have not acted upon the doctrine that a contract calculated to raise prices is necessarily invalid.

In the United States the Courts have gone much further than the English Courts, though I cannot say that the decisions of the former are consistent. Even before the legislation to which I shall refer, they declared illegal combinations to raise prices. There are many decisions in which are found such dicta as these: "Whatever tends to prevent competition between those engaged in a public employment or business impressed with a public character, is opposed to public policy, and, therefore, unlawful; whatever tends to create a monopoly is unlawful as being contrary to public policy."

Eddy (*Law of Combination*) states the rule thus: "All contracts and undertakings in support of a combination, the object of which is to secure such control of the immediate supply of any commodity or product essential to the life or comfort of the community, as to enable the combination to arbitrarily control the prices of such product or commodity, are illegal and void" (Eddy, i. s. 81). "Any combination the object of which is to force fictitious and unnatural advances in prices or oppress those whose necessities compel them to buy is unlawful" (Eddy, i. s. 86).

There is a large class of decisions, State and Federal, to the effect that ,reement to secure freedom from competition and thereby to raise prices is invalid. For example, the head-note of *Nester* v. *Continental Brewery Co.* (161 Penn. 473) is: "Where a number of persons engaged in the same business within the same territory enter into an agreement, the object of which is purely and simply to silence and stifle all competition among themselves, the agreement is in restraint of trade, and void as against public policy. If it appears that such a combination is injurious to the public, the Courts will not stop to inquire as to the degree of injury inflicted, nor whether the restraint be general or partial, nor will they consider the form and declared purpose of the combination." "It is enough to know that the natural tendency of such contracts is injurious" (p. 481). "The true test was the effect upon public interests" (p. 482).

On the whole, no distinct consensus of opinion is to be found in the American decisions as to combinations to raise prices.

[*Note.*—The American cases as to agreements tending to raise prices are collected by Mr. Goodnow, *Political Science Quarterly*, xii. p. 212. A typical case is *Morris Run Coal Co.* v. *Barclay Coal Co.* (1871), 68 Pa. St. 173, where an agreement between five coal corporations to divide the coal from two regions in certain proportions and to sell at prices fixed by a committee, and only to the extent of certain proportions, was held to be illegal. It is characteristic of the diversity of American decisions on the subject that Eddy says: "In the light of the cases of legal combination of capital, and of the cases of legal combination of labour, it cannot be said that the intent to increase prices is either unlawful or contrary to public policy" (i. s. 586).]

VII.—Restraint of Trade and Public Interest or Policy.

In English Courts this factor is often indeed mentioned, but generally only in vague terms; the Court refraining from stating what they mean thereby; reserving to themselves an undefined power of interference, but not indicating when or under what circumstances or according to what principles they would exercise it. There is a recognition of the element of public policy. But so vague is the matter left, so reluctant are Courts to go outside a few classes of conduct deemed inimical to public interest, that one may say that this head of law is in England closed. It is a case of arrested development.

[See *Janson* v. *Driefontein Mines, Limited*, 1902, A.C. 484; also Memorandum by Chairman.]

There are frequent dicta such as these: "Wherever the tolerating of any species of contract has a tendency to produce a public mischief or inconvenience, such a contract has been held to be void" (*Gilbert* v. *Sykes*, 16 East. 150, p. 157). The point is tersely put by Maule J. in *Rannie* v. *Irvine* (1844), 7 M. & G. 969: "The general rule against covenants in restraint of trade is founded on this: that the law favours trade for the sake of the public, and not for the sake of parties engaged in it. And the reason of the exception grafted upon the rule is, that the exception is in furtherance of the rule itself" (p. 977). One of the many references to this element is to be found in the judgment of Bowen L.J. in *Maxim Nordenfelt* v. *Nordenfelt* (1893), 1 Ch. 651: "The principle which underlies the entire doctrine of the unlawfulness of general restraint of trade—that the interests of the contracting parties are not necessarily the same as the interests of the commonwealth" (p. 661). These remarks are also worth quoting: "A rule founded on public policy does not admit of any exception that would really produce public mischief; such might possibly be the case if it were calculated to create a pernicious monopoly in articles for English use—a point I desire to leave open, and one which, having regard to the growth of syndicates and trusts, may some day or other become extremely important" (p. 668). To the same effect, Lindley L.J., who, referring in the same case to the opinion that the only test was the reasonableness of the restraint for the protection of the covenantee, said: "The doctrine ignores the law which forbids monopolies and prevents a person unrestrictedly binding himself not to earn his living in the best way he can" (p. 650).

Some legal systems leave very indefinite the conception of "public policy" or "public order," and give large discretion to judges in determining what is contrary to it (Dernburg, *Das Bürgerliche Recht*, i. 419; Laurent, *Principes de Droit Civil Français*, i. 46, xvi. 440). Our Courts do not treat as illegal all measures against public policy in the wide sense of that phrase. They do not inquire into, discuss, or recognise new heads of public policy.

They would not pronounce illegal Conferences or deferred rebates unless they came within the principle of certain decisions relating to particular heads of public policy.

The fact is, that as to many questions of political economy the Courts are no more able than ordinary individuals to determine the effect of particular measures upon the interests of society. They naturally act in the spirit of the saying of Burrough J. in *Richardson* v. *Mellish*, that arguments of public policy "may lead you from the sound law. It is never argued at all but when other points fail" (2 Bing, p. 252; see also Jessel M.R., L.R. 19 Eq. 462).

The development of law as to this subject in the United States has of late been very different from the trend of decisions here. The Courts of that country have been as bold as ours have been timid in dealing with the element of public interest. This has been done not merely by the statutes referred to below, but by an application or extension of common-law principles to combinations with respect to certain industries. There has been a tendency to regard not merely railways but carriers of all kinds as in a sense public servants, or subject to certain special duties to the public. Contracts are held to be illegal because they are deemed to be in conflict with duties to the public (e.g. *Menacho* v. *Ward*, 27 Fed. Rep. 529). Some of the judgments in which this doctrine is affirmed put in the forefront of their reasoning a passage in Hale's "De Jure Maris" (Hargrave's *Tracts*, Part II. c. vi.): "A man, for his own private advantage, may in a port town set up a wharf or a crane, and may take what rates he and his customers can agree for cranage, wharfage, housellage, pesage; for he doth no more than is lawful for any man to do, viz. makes the most of his own. And such are coal wharfs, and wood wharfs, and timber wharfs in the port of London and some other ports. . . . If the King or subject have a public wharf, into which all persons that come to that port must come and unlade or lade their goods as for the purpose, because they are the wharfs only licensed by the Queen, according to the Statute of 1 Eliz. cap. 11, or because there is no other wharf in that port, as it may fall out where a port is newly erected; in that case there cannot be taken arbitrary and excessive duties for cranage, wharfage, pesage; and neither can they be enhanced to an immoderate rate, but the duties must be reasonable and moderate though settled by the King's licence or charter. For now the wharf and crane and other conveniences are affected with a publick interest, and they cease to be *juris privati* only; as if a man set out a street in new building on his own land, it is now no longer a bare private interest, but it is affected with a public interest."

[*Note.*—Applied to cranes on public wharves by Lord Kenyon, *Bolt* v. *Stennett* (1800), 8 T.R. 606; as to bonded warehouses in *Alnutt* v. *Inglis* (1810), 12 East 527, by Lord Ellenborough and Le Blanc J.]

Accordingly, owners of public warehouses or elevators, innkeepers, persons working a ferry have been held to be subject to control, so as to prevent

discrimination (*Munn* v. *Illinois*, 94 U.S. 113; Eddy, 11, s. 680). For somewhat similar reasons in *Menacho* v. *Ward* (27 Fed. Rep. 529), when a regular line of steamers from Cuba to New York put on a black list those who shipped by tramp steamers outside the combination, and charged them higher rates than others; the Court held that this was an illegal discrimination; its tendency was to destroy competition and create a monopoly.

[*Note.*—Compare this decision with the later decision in *Lough* v. *Oughterbridge* (1894), 143 N.Y. 271, where it was held that a carrier by sea may give reduced rates to customers who stipulate to give him all their business, and may refuse those rates to others who are not able or willing so to stipulate, provided that the charges exacted from the others are not excessive or unreasonable. The Court distinguished the case from *Menacho* v. *Ward*. (See *Harvard Law Review*, xx. 511.)]

VIII.—The Rebate Circular and Restraint of Trade.

There is the further question whether the contract formed by the circular and the acceptance of its terms is in restraint of trade. This point was not decided in the *Mogul* case, which merely determined that a combination by two or more persons to do certain acts not unlawful in themselves which resulted in injury to a third person was not actionable at the instance of the latter. It did not determine whether the contract was valid as between the parties to it, or was invalid as in restraint of trade. It is right to add that Lord Esher held that it was void as in restraint of trade (p. 608), and that it was an indictable conspiracy (610). When the case came to the House of Lords, Lord Hannen said that, in his view, such a contract was in restraint of trade (1892, A.C. p. 58). On the other hand, Lord Watson seems to have been of a contrary opinion (p. 42). In this country the validity of such a contract has not been, so far as I know, determined. As to a somewhat similar contract, quoted above, an American Court held that it was not in restraint of trade (*Olmstead* v. *Distilling and Cattle Feeding Co.*, 77 Fed. Rep. 265). This opinion has less weight than it otherwise might have, because it is based more or less on the erroneous supposition that the *Mogul* case decided the validity of the contract. It may be added that the same contract had come under consideration in another case (*in re Greene*, 52 Fed. Rep. 104). There, too, it was held that such a contract was not in restraint of trade under the New York Statute, July 2, 1890, ss. 1 and 2. It was also held not to be "an attempt to monopolise" within that statute. The purchasers were "simply offered an inducement in respect of these matters, which they were at perfect liberty to comply with or decline. These were not restrained by any contractual obligation during the stipulated period. The agreement was wholly unilateral during that period. Upon compliance with the conditions alleged in the first count, they were entitled to the rebate; but such compliance had no retroactive operation to create a valid and subsisting contract between the parties thereto, or during the period

intervening between the date of the promise and the full compliance with the conditions on which the rebate was to be paid. During the period there was between the parties no contract in restraint of trade" (p. 118). The Court also relied on the *Mogul* case, which is not in point.

The same contract came before the State Court in *National Distillery Co.* v. *Cream City Importing Co.* (39 American State Reports 902; 86 Wisconsin 352), and was held to be not illegal.

These conditions notwithstanding, I am inclined to think that the contract may be in restraint of trade for reasons which I proceed to give. The shipowners not having under their circular bound themselves very clearly to anything, there are few occasions where the question of legality between the parties would be tested; the form of the contract prevents it. But assume such a contract to be signed by shippers and shipowners; assume, first, this simple case: A (shipowner) agrees with B (shipper) to give B a deferred rebate, provided B ships exclusively with A to certain ports. This seems to me to conform to the above-quoted test; the protection to A is only reasonable—at all events, it might be so. But suppose that the contract between A and B is (as it often is) that A will pay the deferred rebate provided B ships exclusively with B, C, D, and E, etc. Here there is protection, not merely for B, a party to the contract, but for E, F, etc., no parties thereto and not bound to B. The protection may be too wide for A's business; the contract is intended to protect all members of the ring and not merely A. I am reluctant to believe that such protection is reasonable, within the meaning of the authorities. On the principle of *Henry Leetham* v. *Johnstone-White*, decided by the Court of Appeal (1907, 1 Ch. 322), such a contract would, it is submitted, be invalid, as being too wide for the protection of the parties thereto.

The distinction here suggested appears to be recognised in some American decisions. (Compare *Menacho* v. *Ward*, 27 Fed. Rep. 529, with *Lough* v. *Oughterbridge*, 143 N.Y. 271.)

As to the "Conference agreements," some, if not all, of them are, it seems to me, in restraint of trade. They seek, some of them avowedly, to prevent competition; they are intended to keep up rates; they may limit sailings; and they profess to restrain minorities of the parties to such agreements as to the mode of carrying on their business according to their discretion. Such agreements appear to come within the words above quoted from *Hilton* v. *Eckersley* and *Collins* v. *Locke*.

IX.—Conspiracy.

I say nothing on the subject of conspiracy—(1) because the question whether a civil action for conspiracy would lie against the parties to the Conference or Ring appears to be determined by the *Mogul* case; (2) because the subject is fully discussed in the Memorandum of the Chairman in the Report of the Royal Commission on Trade Disputes and Trade Combina-

tions, 1906, p. 20, where he arrives at the conclusion that "at common law a combination to do any acts cannot be made the subject of a civil action, unless such acts would, apart from the conspiracy, give a right of action, or unless the combination be a criminal conspiracy" (p. 22).

X.—Shipping Companies and Common Carriers.

In view of various questions which have arisen in the course of the evidence, it may be of interest to note some points in the law as to carriers.

Common carriers are subject to special obligations implied by law. They must carry all goods of the description which they profess to carry for reasonable payment and on reasonable conditions. They are not bound to charge all their customers alike, provided they charge reasonably. Their obligation is (subject to certain exceptions here immaterial) to carry safely. Carriers may be common carriers, though they convey goods out of the realm (*Morse* v. *Slue*, 1 Vent. 190, 238). Owners of ships who carry goods for all and sundry are common carriers, and it matters not that they carry to places outside the realm.

But practically, in modern times, they are not; they carry under special contracts, the terms of which are contained, as a rule, in charter-parties or bills of lading, or both.

A carrier might exclude liability by notice (*e.g.* a circular) brought to the knowledge of the customer; he was held to have received the goods on the terms of a special contract (*Wyld* v. *Pickford*, 8 M. & W. 443). A practice sprang up on the part of carriers to give such notices, and thereby altogether exclude liability (*Peek* v. *North Staffordshire Ry. Co.*, 32 L.J. Q.B. p. 246, 250), which was held to be valid.

This was found to be unfair to customers; they were deprived of their rights at common law, and left without remedy by reason of notices which they perhaps imperfectly understood. At the same time, the carriers' liability as a virtual insurer for articles of great value was often irksome. Accordingly, Parliament intervened. In order to protect them against excessive liabilities, and also to restrict their power of imposing terms on their customers, was passed the Carriers Act, 1830, 11 Geo. IV. and 1 William IV. c. 68, which enacted that carriers (*by land*) were not to be liable for the loss of certain goods (gold, silver, etc.) above the value of £10 unless the value and nature of such articles had been declared and an increased charge paid.

S. 4 states that no public notice or declaration shall limit the carrier's liability at common law in respect of other goods.

S. 6 says that nothing in this Act shall in any way affect any special contract for the conveyance of goods and merchandise. This Act enabled a carrier by affixing a notice in his office to free himself from liability as to certain articles; the liability of the carrier remaining if he did not exercise ordinary care. He cannot by public notice or declaration limit or otherwise affect his liability at common law for any articles or goods carried by him

other than those specified in the Carriers Act, 1830, s. 4. He may, however, limit such liability by making a special contract with his customers (subject to the provisions of the Railway and Canal Traffic Act). It is needless to say that the distinction between such notice and a special contract is often difficult to draw.

Shortly after railways became common, and took over a large part of the carrying business of the country, questions arose as to their power to impose harsh or irksome conditions on customers. Competition becoming rarer, the position of railways and canals becoming more and more in the nature of a monopoly, it was found that the existence of maximum tolls did not prevent abuses, especially in the way of discrimination.

The state of the law was thus described by Blackburn J.: "We find that by the express enactment of the legislature in 11 Geo. IV. and 1 W. IV. c. 68, no public notice or declaration could, as such, in any way affect the liability of a carrier as regarded goods in general, though special contracts might be made as at common law; and it had been decided that such notice or declaration, when brought home to the customer, did operate as being the basis of a contract to carry on the condition in such notice. It had been decided that such conditions, when they made part of a special contract, were binding, even when protecting the company from responsibility for all loss or injury, however caused. It had further been decided that a special contract ought to be inferred from the act of a party sending goods after the receipt of such a notice, even where the party protested against the notice." "And this state of the law, it was alleged by many persons, was taken advantage of by the railway companies, who had a practical monopoly of the carriage of goods, and, as it was alleged, abused their advantages so as, in the language of Story, already cited, to evade altogether the salutary policy of the common law" (Blackburn J., in *Peek* v. *North Staffordshire Railway Co.* [1863], 32 L.J. Q.B. p. 246).

Parliament intervened, and passed the Railway Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20, s. 86), which empowered railway companies to "make such reasonable charges in respect thereof as they may from time to time determine upon, not exceeding the tolls by the special Act authorised to be taken by them."

S. 90 of this Act says that "all tolls be at all times charged equally to all persons and after the same rate . . . passing only over the same parts of the line of railway under the same circumstances."

Questions similar to those which have arisen between carriers and their customers having arisen between railways and the public, to prevent companies abusing their power as quasi-monopolists, certain provisions were inserted in the Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31). In introducing the measure, Mr. Cardwell explained the reason of certain clauses: "We have tried competition enough." He quoted with approval Stephenson's saying, "Where combination is possible, competition is im-

possible" (Hansard, 1854, April 6). The Railway and Canal Traffic Act, 1854, prohibited "any undue or unreasonable preference or advantage to or in favour of any particular person or company" (s. 2).

The same Act (s. 7) declared a railway company to be liable for any injury to any horses, cattle and goods, etc., occasioned by the neglect or default of the company, notwithstanding any notice or declaration limiting its liability, "provided always that nothing herein contained shall be construed to prevent the said companies from making such conditions in respect of the forwarding, receiving, or delivery thereof as shall be adjudged by the Courts just and reasonable."

It may be noted that a railway company does not contravene s. 2 by carrying at a lower rate in consideration of a guarantee of larger quantities and full trainloads at regular intervals (*Nicholson* v. *G.W. Railway*, 5 C.B. N.S. 366; 28 L.J. C.P. 89).

There has been, as to carriers by sea, no legislation similar to that imposed upon carriers by land and upon railways. Carriers by sea may according to English law make what contracts they think fit with their customers. The contrary is, and long has been, the law of the United States. Apart from statute law, a common carrier, both by land and sea, has certain duties out of which he cannot contract himself. He is regarded as performing a public service. Nor is he presumed to bargain on terms of equality with his customers. "The carrier and his customer do not stand upon a footing of equality. The individual customer has no real freedom of choice. He cannot afford to higgle or stand out, and seek redress in the Courts. He prefers rather to accept any bill of lading, or to sign any paper that the carrier presents; and in most cases he has no alternative but to do this, or to abandon his business" (Mr. Justice Gray, *Liverpool Steam Co.* v. *Phœnix Insurance Co.*, 129 U.S. p. 441). The contrary, too, is declared by the Harter Act of 1893, which prevents shipowners from contracting out of certain liabilities as to negligence.

XI.—The Railway Commission.

Reference has often been made in the evidence to the Railway Commission. It may be, therefore, well to state some of its powers. The Regulation of Railways Act, 1873 (36 & 37 Vict. c. 48), s. 6, transfers the jurisdiction of the Common Pleas under 17 & 18 Vict. c. 31, s. 3, and 31 & 32 Vict. c. 119, *i.e.* Railway and Canal Traffic Act, 1854, and Regulation of Railways Act, 1868; that is, the Railway Commissioners are empowered to determine questions of undue preference. S. 14 requires the publication of rates at each station or wharf "from that station or wharf to any place to which they book, including any rates charged under any special contract." Every such book shall be open to the inspection of any person without the payment of fees.

S. 16 gives the Commission power to fix terminal charges.

The Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25), adds to the power of the Railway Commission.

S. 7 authorises complaints by public authorities (London boards, town councils) and any association of traders or freighters or Chambers of Commerce as may obtain a certificate from the Board of Trade.

S. 10 gives jurisdiction to determine the legality of any toll, rate, or charge.

S. 11 gives jurisdiction to order facilities.

S. 12 gives power to award damages.

S. 25 enables the Commission to fix rates as to through traffic.

S. 27 deals with undue preference, and throws upon the railway company in certain cases "the burden of proving that such lesser charge or difference in treatment does not amount to an undue preference."

S. 31 empowers the Commissioners to deal with any person whom a company is charging an unfair or unreasonable rate or charge, or treating in any oppressive or unreasonable manner.

S. I. (1) of the Act of 1894 (57 & 58 Vict. c. 54) states that when a railway company have either alone, or jointly with any other railway company or companies, since the last day of October, 1882, directly or indirectly increased any rate or charge, then, if any complaint is made that the rate or charge is unreasonable, it shall lie on the company to prove that the increase of the rate or charge is reasonable, and for that purpose it shall not be sufficient to show that the rate or charge is within any limit fixed by an Act of Parliament or any other provision.

S. I. (3).—The Commissioners have power to hear and determine any complaint as to an increase, but not until a complaint has been made under s. 32 of the Act of 1888.

Before the Act of 1894, the Commission had no power to interfere with rates (questions of undue preference apart).

Nor did that Act give the Commissioners a general power of inquiring into the reasonableness of rates (L.R. 1 K.B. 717).

XII.—Legislation in other Countries affecting Rebates.

(*a*) *United States.*

It is difficult to describe the policy pursued in the United States. In the first place, all the Courts of the different States have not adopted the same policy. Further, their policy has varied at different times. In recent years it has become much more hostile to combinations. Thirdly, there are different State and Federal statutes. I note only certain points of importance. The common law as to carriers was in the United States substantially the same as that in force here. But it has been altered by statutes, of which the chief are the following:

(1) *Inter-State Commerce Act*, 1887 (twenty-four statutes at large, c. 104). —An Act to regulate commerce.

(2) *Inter-State Act*, amended by Act, March 2, 1889, and extended to joint tariffs of rates (twenty-five statutes at large, c. 382).

(3) *Sherman Anti-Trust Act*, 1890 (twenty-six statutes at large, c. 647).—An Act to protect trade and commerce against unlawful restraints and monopolies.

(4) *Elkins Act*, 1903 (thirty-two statutes at large, c. 708).—An Act to further regulate commerce with foreign nations and among the States.

(5) *Inter-State Commerce Amendment Act*, 1906 (the Hepburn Act, thirty-four statutes, c. 584).—This amends and extends the Inter-State Commerce Act. Thus it prohibits railway companies from transporting any article or commodity other than timber which it may own, in whole or in part, or in which it may have an interest, direct or indirect, except such articles as may be necessary and intended for its use in the conduct of its business as a common carrier (s. 1). The Act also empowers the Inter-State Commission to determine and prescribe just and reasonable rates to be observed as the maximum, on a complaint under s. 13 of the Act of 1887 (p. 15). Through rates to foreign countries are to be filed and published (p. 2). Thirty days' notice of change of rates is required (p. 2).

The Inter-State Commerce Act applies to any "common carrier engaged in the transportation of passengers or property wholly by railroad or partly by railroad and partly by water," etc.

S. 1 enacts that the charges are to be reasonable and just.

S. 2 prohibits special rates, rebates, etc.

S. 6 requires the common carriers to print and publish and keep for inspection and file with the Inter-State Commerce Commission copies of the schedules of rates, fees, and charges applicable to Inter-State traffic.

S. 3 prohibits undue preference.

"The Act to regulate commerce" includes "the whole field of commerce (except commerce wholly within a State) as well that between the States and territories as that going to, or coming from, foreign countries" (U.S.A. 162, p. 212).

It is doubtful, however, whether these words, used by Mr. Justice Shiras, are more than *obiter dicta*.

In the *Cosmopolitan Shipping* case, the Inter-State Commission held that the Inter-State Act did not apply to ocean steamships plying between United States and other countries.

The Supreme Court has held that competition affecting rates at the longer distance may create such dissimilarity as to justify greater charges to short-distance points, unless the latter rates are unreasonably high or the former unreasonably low.

Provided the charges are just and reasonable and there is no undue preference, the Act leaves common carriers in the same position as they were at common law (U.S.A. 167, p. 479).

As to the Sherman Act (July 2, 1890), the Supreme Court has held that this is directed not merely against contracts or combinations in restraint of trade which are unreasonable. "All contracts are included in such language, and no exception or limitation can be added without placing in the Act that which has been omitted by Congress" (*United States* v. *Trans-Missouri Freight Association*, 166 U.S.A. p. 328).

The Supreme Court has in terms stated that this Act applies to "every contract, combination, or conspiracy, in whatever form, of whatever nature, and whoever may be parties to it, which directly or necessarily operates in restraint of trade or commerce among the several States or with foreign nations," and that "the Act is not limited to restraints of Inter-State and international trade that are unreasonable in their nature, but embraces all direct restraints imposed by any combination, conspiracy, or monopoly upon such trade or commerce" (*Northern Securities Co.* v. *United States*, 193 U.S., Harlan J., p. 331).

Under this Act have been held illegal contracts to raise prices; *e.g.* in *Montague* v. *Lowry* (193 U.S. p. 38); agreement between manufacturers and dealers belonging to an association not to purchase materials from manufacturers not members of the association, and not to sell to any not a member of the association for less than list prices.

The Elkins Act deals with rebates, concessions, or deductions, *i.e.* at a less rate than the rates named in the tariffs and filed by such carrier. It (the Elkins Act) "aims, on the one hand, to secure the publication of tariff rates which shall be just and reasonable, and free from discrimination, and, on the other hand, to compel carriers to observe tariffs so published without variation or exception" (Report of Inter-State Commerce Commission, 1903, p. 8).

The Elkins Act does not appear to apply to deferred rebates in the sense in which the phrase is used in this inquiry.

(*a*) The Act in terms applies only to a common carrier subject to the Inter-State Commerce Act of 1887, *i.e.* if I read the latter aright, to transport by rail and water for a continuous carriage or shipment, and it does not apply to shipments by land and water where both forms of transportation are not under common control.

(*b*) The Act applies only to carriers bound to file and publish rates.

(*c*) It is intended to prevent discrimination or preference as between goods carried under like circumstances.

As to whether a contract to give a deferred rebate would be a breach of the Sherman Act, there seems to be no decision expressly in point, and differences of opinion exist as to the point. Mr. Newton Crane has expressed the opinion that there would be a breach (15845). It has been suggested that the Act would not apply if the restraint were reasonable; and such cases as *Whitwell* v. *Continental Tobacco* (125 Fed. Rep. 454) seem to be in favour of that view.

Without venturing to state a decided opinion upon a question still open, it seems most probable that such contract, if carried out by a combination of shipowners, and if in any way restraining trade, would come within the Sherman Act.

(*b*) *Australia.*

The Australian Industries Preservation Act, 1906, modelled on the Sherman or Anti-Trust Act, makes it an offence for any person either as principal or agent to enter into any contract or be a member of or enter "into a combination" with intent to restrain trade or commerce to the detriment of the public; or with intent to destroy or injure by means of unfair competition any Australian industry, the preservation of which is advantageous to the public, having regard to the interests of producers, workers, or consumers.

S. 6 gives a wide significance to "unfair competition." Unless the contrary is shown, it includes a case in which "the defendant, with respect to any goods or services which are the subject of the competition, gives, offers, or promises to any person any rebate, refund, discount, or reward upon condition that that person deals, or in consideration of that person having dealt, with the defendant to the exclusion of other persons dealing in similar goods or services."

(*c*) *Canada.*

Here may be quoted s. 18 of the Customs Duties Act, 1897 (60 & 61 Vict. c. 16): "Whenever the Governor in Council has reason to believe that with regard to any article of commerce there exists any trust, combination, association, or agreement of any kind among manufacturers of such article or dealers therein to unduly enhance the price of such article, or in any other way to unduly promote the advantage of the manufacturers or dealers at the expense of the consumers, a Governor in Council may commission or empower any judge of the Supreme Court or Exchequer Court of Canada, or of any Superior Court in any province of Canada, to inquire in a summary way into, and report to the Governor in Council whether such trust, combination, or association, or agreement exists."

If the judge reports that such trust, etc., exists, etc., the Governor in Council shall place such article on the free list, or so reduce the duty as to give to the public the benefit of reasonable competition.

(*d*) *Germany.*

As to the law in Germany relating to combinations of the nature of "Rings," I need say little; the subject has been fully discussed by Dr. Schuster (answer 11744 *et seq.* See also *Political Science Quarterly*, xx. 13). There appears to be no criminal law directly bearing on the subject. As to the civil law on the subject, Arts. 823 and 826 of the Civil Code are in point. Under the latter the Courts have wide discretion, and may hold to be invalid agreements which are contrary to what right-minded people think fair; discretion which enables the Court to interfere where there is oppressive conduct or where there is a monopoly. It may be permitted to quote certain words of the judgment of the Reichsgericht in *Blumenthal* v. *Deutsche Australische S.S. Co.*:

"Even the exercise of a mere formal right is affected by Art. 826, if damage to others is thereby intentionally caused in a manner contrary to public morality. The judge is to derive his standard from the conception of public morality from the prevailing popular consciousness, the sense of right on the part of all those whose ideas are equitable and just. . . . With this must not be confounded a business practice which has actually been adopted, but which may possibly be an abuse rather than a custom." These words also are of importance: "The economic requirement that those trades which are indispensable for the general welfare or business intercourse should not refuse their services to anybody, carries with it also, if evolved into a legal requirement, an obligation with respect to the conditions of the contract. A compulsion to effect transports obliges the contractor who publicly offers to the public his services under certain conditions to apply the same standard to the parties interested who are dependent upon him; it denies to him the right to exclude arbitrarily or for dishonest reasons any single party from the conditions of transport otherwise offered to the public. A proceeding of the latter kind, however, may, where compulsory duty does not exist, present itself as an act offending against public morality. According to the ideas of decency and honesty in trade prevailing among us, also the conduct of a contractor for transports who excludes a single individual or group of individuals from the tariffs generally announced to the public, is considered as an offence against public morality, if it takes place for the purpose of unfair competition. It would constitute dishonest competition if in the present case the defendants tried to cause damage to parties connected with their competitors by exceptional tariffs solely for the purpose of dislodging or crushing competition inconvenient to them."

One contrast pointed out in Dr. Schuster's evidence may be noted: "In the English Courts it has been expressly laid down that there is no such thing as unfair competition, and that you might compete in any way you like; whereas the German Courts have laid down the opposite principle.

They have laid down the principle that there is such a thing as unfair competition which the Courts can restrain" (11793).

(e) *Austria.*

The Law of April 7, 1870, declares in effect that "agreements of persons engaged in industry with the purpose of raising the price of a commodity to the disadvantage of the public" "have no legal operation." (See *Political Science Quarterly*, xx. p. 21.)

(f) *France.*

In France there was in former times much legislation against *accaparement*, similar to that in England against forestalling and regrating. The present law is chiefly contained in Arts. 419 and 420 of the Penal Code. According to the former, all those who "by false or calumnious reports spread by design in the community, by offers of prices over the prices which the vendors themselves ask, by union or combination on the part of the chief holders (*détenteurs*) of the same merchandise or commodity, not to sell or to sell only at a certain price, or by whatever fraudulent ways or means shall have effected a rise or fall of the price of merchandise or securities, above or beneath the price which would have been determined by the natural and free competition of trade, are punishable with imprisonment of one month to one year, and a fine of 500 to 2,000 francs."

Art. 420 imposes severer punishment if these operations have relation to grain, flour, farinaceous substances, bread, wine, or other liquor. It was the intention of the framers of the Code to punish not merely those who resorted to *moyens frauduleux*; the alteration of prices operated by combination was itself an offence.

The section in terms names only *denrées*. But the Cour de Cassation has held that it extends to the *entrepreneurs de transport* (*L'Accaparement et les Formes modernes d'Entente*, etc., par R. de Birague d'Apremont, p. 81). "Détenteurs" has been extended to include *commerçants*.

The subject is dealt with in a note to a decision of the Tribunal Correctionnel of the Seine and of the Court of Appeal of Paris (Dalloz, 1903, 2nd Partie 297). The writer (M. Percerou) says, with respect to trusts: "Limités à un nombre restreint de producteurs, ils sont impuissants à réaliser l'accaparement et peuvent, au contraire, rendre à l'industrie d'une région, patrons et ouvriers, de précieux services. Ceux-là méritent la protection, ou tout au moins la tolérance du législateur. Quant aux mauvais trusts, aux trusts de pure spéculation, formés non pour la défense d'intérêts économiques légitimes, mais pour provoquer, par l'accaparement total d'un catégorie de marchandises, une hausse fictive et frauduleuse des cours, la loi doit les frapper avec sévérité."

The same writer points out a distinction according as the proceedings are criminal or civil. If the question is the former, Art. 419 is *strictissimæ*

interpretationis, whereas if it is the latter, the question is less whether the letter of that article is complied with than "rechercher si, d'après son but, son résultat, le nombre de ses membres, son rayon d'action, sa durée, et d'autres circonstances encore, le syndicat litigieux doit être rangé parmi les bons ou les mauvais trusts, c'est à dire s'il est ou non contraire à l'ordre public."

The effect of the cases appears to be that any combination as to carriage of goods which tends to produce a monopoly to the detriment of others is within Art. 419 (Dalloz, 1901, Partie 2, 150).

(*g*) *Other Countries.*

To the legislation of other countries than the above I need not refer; some of them are mentioned in the answers to the circulars sent abroad.

XIII.—Foreign Courts and Rebates.

The question has been asked, how would foreign Courts regard a law passed in the United Kingdom or a British Colony declaring deferred rebates illegal. Such a law might declare (*a*) promising or giving a deferred rebate illegal in the sense that it imposed penalties in the nature of punishment upon the parties to such an agreement, or (*b*) it might declare any such agreement void, or it might declare that such rebate was in whole or part recoverable at an earlier date than that provided in the agreement, or notwithstanding the non-fulfilment of the conditions of the agreement.

It may be taken that a foreign Court would not enforce a law of the first-named character; it is a principle of private international law that a strictly penal law will not be enforced in a foreign country (*Huntingdon* v. *Attrill*, 1893, A.C. 150).

As to a law containing provisions of the last-named character, it is conceived that on the general principles of private international law they would be enforced as not being contrary to public policy or public order.

There might, however, be in the absence of an express provision in the bill of lading or elsewhere a difficulty as to the law applicable to the particular contract of affreightment. In England the Courts have been disposed to adopt the law of the flag (*Lloyd* v. *Guibert*, L.R. 1 Q.B. 115). That, however, is far from an inflexible rule. The English Courts will look to all the circumstances in order to ascertain the intentions of the parties (*in re Missouri Steamship Co.* [1888], 42 Ch. D. 321. See also *Liverpool Steam Co.* v. *Phœnix Insurance Co.*, 129 U.S. 397).

In Germany the contract of affreightment appears to be in general governed by the law of the destination or place of performance. But this is not an absolute rule. Bar remarks (s. 330): "It is particularly unsafe to attempt to take as our exclusive guide in the matter the law of the place of destination." [As to the French law, Despagnet, 297.]

XIV.—General Results.

Summarising the chief points of this memorandum, it would seem :

(*a*) That the "deferred rebate" cannot be recovered at law by a "disloyal shipper."

(*b*) That the contract as to such deferred rebate might under certain circumstances be held to be in restraint of trade and, as such, invalid.

(*c*) That almost everywhere contracts unreasonably in restraint of trade are invalid, and that in the United States there is a tendency to declare invalid all combinations in restraint of trade.

(*d*) That carriers by sea are not subject to the obligations imposed on carriers by land and railway companies.

(*e*) That there is, generally, a tendency to attempt (by legislation or judicial decision) to maintain competition, and to prevent the creation of monopolies by combination, especially as to necessary articles or services.

(*f*) That, so far, carriers by sea have been subjected to few restrictions, even when they have maintained a monopoly in fact.

(*g*) That there have been attempts to discriminate between natural rises of price ("by the natural laws of trade") and artificial increase by combination.

(*h*) That in England the conception of conduct deemed by the Courts to be contrary to public policy is now fixed, and cannot be extended by judicial decision.

(*i*) That a contract embodying a deferred rebate circular would probably be illegal under the Sherman Act.

(*j*) That penalties imposed by a statute passed here against the granting of deferred rebates would not be enforced in other countries.

NOTES.

The Judicial Committee.—Much valuable matter appeared in *The Times* on Empire Day, and among it the following article on the Judicial Committee:

"On Empire Day it is fitting to call attention to the Judicial Committee, one of the oldest links between the Mother-Country and her offspring, and still to-day a part of our Constitution as to which the friends of Imperial unity are proud and hopeful. It is in several respects a unique Court. It is the final Court of Appeal for all subjects outside the United Kingdom—that is, little less than 400 million, or nearly a third of the human race. No tribunal, ancient or modern, has had so wide a jurisdiction. The rescripts of the Roman Emperors were law to a population probably not one-fourth of the multitudes which look to it for the last word in all legal controversies. It is supreme as to all litigation arising within some 11 million square miles. According to Gibbon, the Roman Empire at the height of its power extended to about 1,600,000 square miles. The chief Courts of the past, such as the *Reichskammergericht* of the old German Empire, were the last resort of a few millions. The great Courts of the present day, such as the *Reichsgericht* at Leipzig, the *Cour de Cassation* at Paris, and the Supreme Court of the United States, are in respect of the area of their jurisdiction not in the same category as the Judicial Committee. Nor do any of these Courts administer systems so varied as those which come before the Committee. It has on one day to determine a question turning on an obscure passage in Manu or the Mitakshara. Another day the *locus classicus* is a passage in the Koran or the Hedaya. It may pass from dealing with a dedication of property to an idol to a question of mercantile law which has arisen in Bombay. It is called upon to determine nice questions of old Roman-Dutch law in a way in which no modern Dutch Court is required. In South Africa and British Guiana is in force the Roman-Dutch law; and Grotius, Voet, and Vinnius are the authorities quoted. Many a Dutch lawyer, familiar with the practice of the law in his own country, has spent a successful professional life without looking into some of the authorities which the Judicial Committee may from time to time have to study. As with old Dutch-Roman law, so with ancient French law. Expelled from its native home, it survives in parts of our Colonies. From Mauritius come appeals as to points of French law as it appears in the

Code Napoléon; and such, too, is the position of the Seychelles Islands. In Canada older elements survive. The Quebec Act of 1774 re-established some of the old French laws, including the Custom of Paris. Not unfrequently the authorities have to be looked for in Beaumanoir or Dumoulin. From the Channel Islands may come questions as to the Custom of Normandy; from Cyprus questions as to *status*, etc., to be determined by Ottoman law; from Malta points in Roman law, raising nice questions as to substitutions and *fideicommissa*; and from outside the Empire, from Consular Courts and from territories in which law is administered under the Foreign Jurisdiction Act, there also come most varied appeals.

"*The Influence of the Court.*

"The Court administers very different systems. It has influenced them all; and the instructive story of this influence has not yet been told with adequate fulness. It has been usually indirect and unavowed. It has not been less marked on that account. Thus it has notably affected the tenor and course of Indian law; generally, it must be added, by recognising and encouraging the growth of elements already present, by wisely fostering germs at first scarcely visible, but sometimes by introducing new ideas. Only a hundred years ago the conception of a will was scarcely known to Hindu law. It grew up in response to native needs. That growth was encouraged and facilitated by the action of the Judicial Committee, which, if it had been so minded, could have arrested its development. To name a kindred subject: the Hindu mind was familiar with perpetuities, and did not see the objections to them which weigh with the Western world. There was no legislation against them; there was nothing clearly contrary to them in the Smritis and other sources of Hindu law. But the Tagore decision, as expressed in Mr. Justice Willes's epoch-making judgment, while not introducing the English law of perpetuities, indirectly opened up a new chapter of law. All legal systems are subject to change; even those are not excepted which, as is the case with Mahomedan law, are based on religious conceptions. The fundamental rule may be found in the Koran. But face to face with modern civilisation its expositors do not hesitate to bend its meaning to their needs, and in the words of Gibbon to substitute for the literal meaning 'a dexterous interpretation more apposite to the principles of equity and the manners and policy of the times.' That process of adjustment has been going on in India, at times with remarkable celerity; and on the whole the Judicial Committee has co-operated at once with promptitude, caution, and wisdom.

"As the final tribunal in Indian suits it has not lacked critics. A few, and only a few, of them have reproached it with introducing too freely English elements into the Hindu system. Among the latest criticisms to which it has been exposed is the reproach that in regard to wakf settlements it has deviated from the spirit of true Mahomedan jurisprudence. With

more plausibility and frequency it has been accused of faults of an opposite character. It has been sometimes charged with mistaking dead for living law, with being too much the slave of texts which do not express the opinions of to-day and of not always recognising growth or making quick response to new ideas.

"The Court is unique in its jurisdiction and opportunities. How far has it risen to the height of them? In answering this question it would be folly to ignore an important change. The Indian and colonial Benches are not what they were thirty or forty years ago; the standard of judicial efficiency has been much raised; and among Indian and colonial judges are lawyers who would adorn the Bench of any country. Some are the highest authorities as to the systems of law which they administer. It would require courage on the part of any tribunal composed of English lawyers to overrule the decisions of Chief Justice de Villiers or Chief Justice Maasdorp on a point of Roman-Dutch law. Upon the Committee have been men such as Peacock, intimately and practically acquainted with Indian law. But it would be claiming too much for the Judicial Committee that, in the estimation of the profession, its decisions as to points of Indian law would necessarily always carry greater weight than any Court below whose decisions were under review. In the memorable speech on law reform Brougham could say that he 'did not wonder that the sentences in the colonial Courts were often ill-digested or hasty or ignorant, when we find a bold lieutenant-general Lord Chancellor in one Court, and an enterprising captain President in another, and a worthy major officiating as Judge Advocate in a third.' All that is very ancient history. The Indian and colonial judges are with few exceptions men of ability and experience. True, there is still not wholly unknown a kind of judgment which is the despair of an appellate Court; one which mixes law and fact inextricably, and collects, with indiscriminating industry, a coagulated mass of more or less relevant authorities. But such judgments are now very rare.

"*Its Efficiency.*

"The efficiency of the tribunals in India and the Colonies has been increased. Has a corresponding improvement taken place in the Judicial Committee? An endeavour will be made to answer the question with candour. In describing the variety of systems of jurisprudence brought under review, Brougham said that the position of the Court might be deemed to involve 'both ignorance of the law and unfitness to judge of the facts.' But, he added, 'so much the more anxious should we be to remove every unnecessary obstacle to right judgment and to use all the correctives in our power. The judges should be men of the largest legal and general information, accustomed to study other systems of law besides their own, and associated with lawyers who have practised or presided in the colonial Courts. They should be assisted by a Bar limiting its practice for the most

part to this Appeal Court, and at any rate making it their principal object. To curtail in some degree the delays necessarily arising from the distance of the Court below.' Has that ideal always been kept in view? Is it to-day fulfilled? The elements of strength of the Court are many and great; its independence and aloofness, the integrity and high reputation of its members; their power of looking with clear eyes on facts sometimes seen elsewhere through the mirage of local prejudices, a sense of responsibility and of the traditions of the past which impose certain virtues and exclude certain failings.

"The elements of weakness are also visible. There is the costliness of the procedure, each appeal costing on an average over £300. This means the exclusion of all but wealthy petitioners. There was a time when the great bulk of the appeals came from the West Indies. Now they send practically none; the majority come from New South Wales or from wealthy suitors in India. The change is not ascribable to the superiority of West Indian judges. The poverty of these islands, the inability of suitors to carry their cases to the foot of the throne, the smallness of the sums at stake, are the explanation. Matters are not much better than they were, though of late some changes calculated to reduce slightly expenses have been made in the rules. Australian appellants complain that the situation is worse than it was: the existence of the Supreme Court of the Commonwealth may interpose a new stage in the long road between the first and final adjudication. There are other peculiarities of the Court of which its critics make much. It is certainly remarkable—some would say unfortunate—that among the many eminent lawyers who have sat on the Board and heard appeals from India, there has been none conversant with the original languages of the texts to which in the last extremity the Court must resort for guidance. There have been in India great English scholars, men who have done as much as any to investigate ancient Hindu and Mahommedan law, among them Sir William Jones and Colebrooke. But they were not members of the appellate tribunal. It was perhaps inevitable, but it is regrettable that no great authority on the many systems of law which the Judicial Committee administers has ever sat in it. From New Zealand and other Colonies come occasionally complaints that the judges do not always understand the local circumstances, the facts known only to the man on the spot, which make this or that decision, though legally possible, practically absurd. There are scholars who will have it that the handling of texts through the medium of translations is equally liable to cause error. Another cause of complaint may be here mentioned. An Indian or Colonial Court delivers an elaborate judgment in a case involving a point long and much discussed, one as to which professional opinion has been divided. The Courts, it may be, administering Roman-Dutch law, are not agreed: or there may be a permanent controversy among Indian lawyers as to the purport and scope of certain passages in the ancient text-books. If the Judicial Committee gives

no elucidation of principles, but confines itself to deciding the immediate question, on very narrow grounds, the suitors may be satisfied; the legal profession and the Courts in India and the Colonies are deeply disappointed.

"*Members of the Court.*

"We must not be understood to forget the illustrious men who have taken part in these deliberations of the Judicial Committee. Of the living members of the Court who have raised or upheld its dignity it would be invidious to speak. Nor is it easy to name among its past members any members who have been pre-eminent. Almost every judge of distinction has sat upon the Board. Two, however, in particular—Lord Kingsdown and Lord Watson—may be named. The former was in his time all that a judge of such a Court should be; possessed of wide knowledge, with large outlook, studious to give full effect to the spirit of the local jurisprudence. The latter may best be described in Mr. Haldane's well-chosen words: 'He was the Privy Council judge *par excellence*. His mind was wholly free from any tendency to technicality and he never failed to endeavour to interpret the law according to the spirit of the jurisprudence of the Colony from which the appeal came. If it was a Cape appeal, he was a Roman-Dutch lawyer; if it was an Indian case of adoption, he entered into the religious reasons for the rule to be applied; if it was a Quebec case of arbitration or a case of substitution under the old French code, or a Jersey appeal about the Custom of Normandy, it was the same.'

"If the Constitution of the Dominion works with wonderful smoothness; if the relations of the Home Government, the Dominion, and the Provinces are adjusted with a precision which excites the admiration of all who examine them, this is due to none so much as to Lord Watson. He did for the Dominion Constitution what Marshall did for the United States.

"The value of the services of such judges is incalculable. Nor are they unappreciated. We have mentioned criticism of the Court. It is pleasant to cite praise no less emphatic as to its value. Here, for example, is the recent testimony of a distinguished colonial lawyer who, speaking in the name of Canada, said: 'Her people look to the advisers of the Sovereign in Council in matters of the highest moment for a breadth of decision not surpassed by that of any tribunal in the whole world.' The Privy Council 'is the keystone upon which, if we work wisely, we may build up the great edifice of Imperial federation.' This Court, which has no accessories of pomp, has won the respect of the most diverse communities.

"*Its Future.*

"In forecasting the future of the Court, it is necessary to consider the position of the Judicial Committee with regard to the Supreme Court of the Australian Commonwealth—an unsatisfactory position, one which has been truly called 'a solecism in jurisprudence.' By the Commonwealth

Act (s. 74) it is stated: 'No appeal shall be permitted to the Queen in Council from a decision of the High Court upon any question, however arising, as to the limits *inter se* of the constitutional powers of any two or more States, or as to the limits *inter se* of the constitutional powers of any two or more States, unless the High Court shall certify that the question is one which ought to be determined by her Majesty in Council.' The framers of the Act thought that they who made it would be its best interpreters. The statute goes on to preserve the Crown's rights, 'except, as provided in this section, this Constitution shall not impair any right which the Queen may be pleased to exercise by virtue of her Royal prerogative to grant special leave of appeal from the High Court to her Majesty in Council'—which lets in an undetermined class of appeals. The statute also proceeds to say 'the Parliament [*i.e.* the Commonwealth Parliament] may make laws limiting the matters in which such leave may be asked, but proposed laws containing any such limitation shall be reserved by the Governor-General for her Majesty's pleasure.' The clause in the South African Constitution Bill dealing with this matter (106) is much the same. 'There shall be no appeal from the Supreme Court of South Africa or from any decision thereof to the King in Council, but nothing herein contained shall be construed to impair any right which the King in Council may be pleased to exercise to grant special leave from the Appellate Division to the King in Council. Parliament may make laws limiting the matters in respect of which such special leave may be asked, but Bills containing any such limitation shall be reserved by the Governor-General for the signification of his Majesty's pleasure.' The reservation of the right to grant 'special leave' has been the subject of constant criticism. At the last Colonial Conference there was passed a resolution that much uncertainty, expense, and delay would be avoided 'if some part of his Majesty's prerogative to grant special leave to appeal in cases where there exists no right of appeal were exercised under definite rules and restrictions.' The difficulty, and it is great, is to define beforehand the circumstances in which special leave should be granted. It is chiefly of use on exceptional and abnormal occasions; in cases in which there has been a failure of justice from unforeseen causes, *e.g.* by reason of the inability of the suitor to bring forward some point in the Court below. The present position of things is, it must be owned, unsatisfactory, if not perilous. There are two final Courts, the decisions of which have already come into collision, and which must from the nature of things from time to time take different views of the same questions. There was the memorable conflict between the two Courts in the cases of *Webb* v. *Outtrim* and *Deakin* v. *Webb*. The Judicial Committee took a view of the point of law involved in it contrary to that of the High Court. The High Court did not give way. The difficulty has to a certain extent been surmounted by a Commonwealth Act of 1907, which blocks

effectually one road of approach from Australian Courts; it does not block all; and at any time we may see a renewal of the conflict.

"There are some advantages in the present indefiniteness; there is no foreseeing with certainty the occasions upon which a suitor should resort to the Judicial Committee. But if there must be a definition of the grounds upon which special leave shall be granted—and many Australian lawyers press the point strongly—it should include cases in which the Australian Court is divided in opinion.

"*Suggestions for Improvement.*

"It may seem presumptuous as well as futile to add one more to the many proposals which have been put forward for the improvement of the Judicial Committee. That which is submitted has at least one merit—it includes some of the chief features of several schemes: (*a*) The Committee should be recruited by the addition of two Indian or Colonial judges appointed for a term of at least fifteen years, and paid, while holding office, on the same scale as Lords of Appeal. (*b*) Certain Indian or Colonial judges to be regularly summoned if they happen to be in this country, to hear, or sit as assessors in, appeals involving questions of law with which they are specially familiar. (*c*) A small rota of lawyers, not necessarily judges, who may be summoned in cases in which their special knowledge is likely to be useful. Some of the greatest ornaments of the Court in the past had no previous judicial experience—Lord Kingsdown and Lord Watson, for example. A further suggestion is that much more might well be made of the powers given under s. 4 of the Act of 1833, which states that 'it shall be lawful for his Majesty to refer to the said Judicial Committee for hearing or consideration of such other matter whatsoever as his Majesty shall think fit; and such Committee shall thereupon hear or consider the same; and shall advise his Majesty thereon in manner aforesaid.' Hitherto used chiefly in considering complaints as to colonial judges, this power might be put in operation with advantage much more freely. Strengthened in the manner which we have indicated, this tribunal might be welcomed by the colonists and accepted as the final arbiter in questions not wholly legal. One further observation is needed. The opportunities of the Court in the past have been great; they may not endure—they may disappear if it is not made to meet modern requirements. Not so much direct opposition to it, as atrophy; not the perils incident to growth, but the absence of it; the failure to adjust the Court to new circumstances are, and always have been, the dangers ahead. Surely some half-dozen statesmen and lawyers of repute and experience, including, say, the present Lord Chancellor, Mr. Haldane, Sir Robert Finlay, Mr. Deakin, Chief Justice Griffith, Sir Henry de Villiers, and Sir Wilfrid Laurier, could prepare a scheme which would be generally acceptable throughout the Empire."

Goethe as a Jurist.—That Goethe was a lawyer is common knowledge.

That, notwithstanding his repugnance to the practice of law, he mastered its principles and was well acquainted with its rules, and that he showed great aptitude for law, is less widely known, but is made clear by a paper read before the Berlin Juristiche Gesellschaft by Dr. Baumgarten upon "Goethe als Jurist." When he returned from Strasburg University to practise as an Anwalt in Frankfurt, his native town, his family connection at once brought him work; and the "Prozessakten" prepared by him and preserved in the city archives show his clear and acute mind. In all of them is found, says Dr. Baumgarten, an earnest striving after truth. "I should be ashamed to colour the facts or to state them incompletely; a true and clear narrative is the simplest mode of exhibiting to a judge the justice of the case."

Among other interesting points brought to light in the paper are Goethe's opinions on capital punishments, as stated in his thesis on the principle "Pœnæ capitales non sunt abrogandæ." Though writing in the *Aufklärungszeit* when there was a movement in favour of their abolition, Goethe held fast to the opinion that they were for State reasons necessary. If they were given up, men must take the law into their own hands. Goethe discussed the subject of duelling as a jurist and a practical statesman, and his compromise is interesting. On marriage and divorce he expressed himself with caution. "What matters whether two married people beat or nag each other, if for the general good the sacredness of marriage is unimpaired? The same people, if they were free, would in other relations have much the same experience." There is no trace of sentiment in the sayings which Dr. Baumgarten quotes. Obviously the poet, with his wide sweep of interests, had meditated much on the larger aspects of law. The author of the saying "Alles Recht und alle positiven Gesetze sind nur ein ewig Versuch, die Selbsthilfe der Individuen abzuwehren," had definite ideas about the great problems of jurisprudence.

An Explanatory Note on Trade Domicile by T. Baty, Esq., D.C.L.—"It is now clear—what was not clear before—that Professor Westlake does not identify 'trade domicile' with the possession of a house of trade, nor with trading plus residence. How far a contrary inference was justifiable need not be argued here at length. The instances which the Professor gives of trade domicile in the works which he and I cited are instances of trading, from which the obvious but mistaken conclusion was that trade in the trade domicile was of the essence of the conception.

"To this misapprehension are to be attributed most of the statements to which Dr. Westlake takes exception. It was all-important, on this footing, to show that Wheaton had not a specifically mercantile residence in contemplation when he spoke of the dangers of a hostile domicile. Had this been appreciated, it would have been seen that it was beside the point to argue that the individual contemplated by Wheaton 'must be a merchant,' because he has a share in a house of trade abroad. Such a person is

not specifically a merchant *quoad* his place of residence. His residence there is not necessarily a trading residence. To describe him as a 'merchant' suggests that it is apart from this, and in any other connection; I should not have dreamed of objecting to the innocent substitution of 'merchant' for Wheaton's words. Again, it was solely this mistaken interpretation of his attitude—*i.e.* that he identified trade domicile in some way with trading—that led to the observation that he appeared, in common with others, to think that the whole question concerned only merchants—that, as he phrases it, 'wherever there are cargoes there is trade.' It is perhaps permissible to hold to the belief that owners occasionally transport their own property by sea; but this aspect of the matter would have called for no special animadversion, had it not been for the assumption that Dr. Westlake equated trade domicile to trading residence.

"Lastly, it was on account of this misapprehension that an incursion had to be made into the realm of Admiralty antiquities. Here I hope I did not mistake, for I did not dogmatise. My point was that if (as Stowell thought) domicile was accepted as a ground of condemnation for severely practical reasons, trading in the domicile was no necessary element. It was not in my power to prove the true origin of the rule; all that I did was to express surprise (and I still feel it) that the Admiralty had thus early, in public matters affecting the rights of the Crown, adopted a rule so complete, clear, and independent of the common law. Professor Westlake's lenient hypothesis, that I had 'forgotten' the international nature of the early Admiralty practice, I am afraid I cannot rely on (see *The Judicial Review*, 1908).

"One word may be permitted on the general position that nationality is the prime test of hostility. This was only mentioned in my article to bring its special subject into focus. I am not concerned to defend the position. But if the error of the present writer as to existing Anglo-American law consists in agreeing with the dictum of Lord Davey in *Janson*, that 'an alien enemy [is] a person owing allegiance to a government at war with the King,' rather than with that of Lord Lindley, which I cited in my article, and on which Professor Westlake relies, I am content to err in company with that noble and learned person, and apparently also in the company of his colleagues, Lords Halsbury, Macnaughten, and Brampton—none of whom assented to Lord Lindley's *obiter dictum* in any shape or form.

"On the evils of applying to one set of cases a lax standard of domicile, abandoned for every other purpose, I prefer not to enlarge. Only, if the *Harmony* has been so completely torpedoed, why is it cited by Phillimore and in recent cases as an authority on civil domicile? And see (*Fitzgerald*, *Times*, February 7, 1906) as to the facility with which civil domicile can yet be changed."

Monro's Translation of the Digest.—The Editors are indebted to Mr. J. E. Hogg for the following note:

"In 1904 the late Mr. C. H. Monro published vol. i. of what was intended to be a translation of the whole fifty books of the Digest of Justinian. That volume contains the three prefaces to the Digest, and books i.-vi. Before another volume could be produced Mr. Monro died, and a further instalment of the translation has now been published under the editorship of Mr. W. W. Buckland. Vol. ii. carries the work to the end of book xv. The greater part had already been done by Mr. Monro, and Mr. Buckland has completed what was left to be done. The two volumes thus constitute a little more than a fourth of the whole, and nothing is said by Mr. Buckland in his short preface to vol. ii. about any further instalment. This is most disappointing, and it is to be hoped that the University Press authorities will succeed in inducing Mr. Buckland, or some other competent scholar, to carry on the project as originally designed without too much delay between the appearance of the successive volumes. Vol. iii. would begin with book xvi., and if Mr. Buckland could have made vol. ii. cover book xvi. instead of ending at book xv., he would have greatly increased the value of the volume. Roman-Dutch lawyers in particular would have been glad to see Title 1 of book xvi. translated, for this Title comprises the famous *Senatus consultum Velleianum* which, as recently as May last, had to be considered in England by the Court of Appeal: see *Bank of Africa* v. *Cohen*, 25 T.L.R. 625. This same Title 1 of book xvi. has also been the subject of express reference in the enactments of a British legislature, having been repealed in British Guiana in 1904. The *nexus* thus established between English and Roman law opens up the whole question of the utility of putting the Digest into an English dress. It has sometimes been said that an English translation of the Corpus Juris is useless, because the only persons who consult it at first hand are able to do so without the help of a translation. It is, however, quite certain that many people are deterred from consulting the Corpus Juris because it is in Latin and a good translation is not immediately available. For one thing, many excellent lawyers have allowed their Latin to rust. But no one other than an extremely accomplished Latinist could possibly find a particular passage, or get the sense of several passages, so quickly in a Latin version as in an English one. It is in the inducement to consult the Digest itself that the chief value of a good translation consists. Those lawyers who do learn the rudiments of Roman law learn them, under the present system of legal education in England, at a time when the educative effect of any knowledge of Roman law is next to nothing. An English lawyer with a good knowledge of his own legal system will, on the other hand, have his grasp of legal principles enormously strengthened by even looking into the Digest. He will be surprised at the modern note of many of the statements, both in the Preface and the fifteen books themselves that occupy the two volumes of Mr. Monro's translation. 'The character of human law is to be constantly hurrying on, and no part of it is there

which can abide for ever, as nature is ever eager to produce new forms, so that we fully anticipate that emergencies may hereafter arise which are not enclosed in the bonds of legal rules': vol. i. p. xxxiii. It would be idle to quote passages from the Digest itself, but let the reader open vol. i. at p. 201 and glance through book iv. Titles 1-4, particularly Title 3 on *dolus malus*; so with vol. ii., books vii. and viii. (pp. 1-150) deal with usufruct and servitudes, and with respect to servitudes our own English law of easements is largely founded on this part of Roman law.

"The translation in these two volumes is probably as clear and forcible as any English version could be, and for the most part is sufficiently intelligible without any reference to the Latin text. Absolutely and completely intelligible no translation can possibly be in itself. Though professing to be merely a translation, Mr. Monro's version is really something more. The critical notes, wherever a reading (usually one of Mommsen's) has been adopted that is not in the ordinary text, are valuable and interesting. A very large number of Mommsen's conjectural readings have been adopted as the basis of the translation. Some of these are extremely ingenious. One of the first is on p. 6 of vol. i. (1. 2. 1.). The Latin text is: 'Facturus legum vetustarum interpretationem, necessario *prius* ab urbis initiis repetendum existimavi.' Mommsen conjectured for 'prius'—'p[opuli] r[omani] ius,' and Mr. Monro adopts this, with excellent results on the general sense of the passage. One difficulty in the translation itself is to get the right legal and literary ratio between different terms, as, for instance, usufruct and ownership—*ususfructus* and *dominium*. The expressions 'bare ownership,' 'bare owner' are frequently used to mark the necessary distinction. Now and again, possibly, the word 'bare' is used where it might have been omitted. There is one place where a slip seems to have been made—p. 216 of vol. i. The case is put of a man being 'induced by *dolus malus* to promise on stipulation under circumstances so dishonouring to the *promisee* that no magistrate would allow an action,' etc. Surely 'promisor' is meant? The Latin text is simply: 'si stipulatio *tam turpis* dolo malo facta sit.'

"Seeing that a first-hand knowledge of the Digest is of more than mere academical value in Scotland, South Africa, British Guiana, and Ceylon, besides its usefulness to scientific English lawyers, it will be a thousand pities if vol. ii. is not quickly succeeded by vol. iii., and Mr. Monro's noble scheme thus carried out to completion."

The Treaty-making Power.—The following article from *The Times* is a study of a problem which has a peculiar significance in these days for the Empire:

"One of the anomalies of our Empire—one of the many results of the fact that it has grown, and has not been made according to any plan or scheme—arises out of the powers of the Crown as to treaties and the position of the self-governing Colonies. Here theory seems to be at variance with

practice; the former made for a state of things which no longer exists. A new practice is being formed; it has not yet found its theoretical exponent. There are efforts to preserve, as one of the essentials of sovereignty, the unity of the Empire while free play is given to the aspirations of the dominions beyond the sea. To invest them with unlimited power of negotiating treaties would be to clothe them with an international status, to make them sovereign States, and in the end, it might be, to break up the Empire. That must be averted without thwarting the reasonable demands of colonial statesmen to be considered and consulted in all that directly affects them. Every Colonial Secretary since the seventies has been confronted with this difficult problem in some form, with the result that a fairly workable compromise has been established; not, indeed, a complete arrangement, but one which gives reasonable hopes that eventually all points of difference will be amicably settled. The history of the struggle between two opposing forces, those making for unity and those tending towards decentralisation, has not yet been written; the ordinary text-books are silent or far from explicit as to it; there is little that is instructive on the subject except in Messrs. Quick and Garran's volume, Mr. Harrison Moore's *Australian Commonwealth*, and last, but certainly not least, Mr. Berriedale Keith's *Responsible Government in the Dominions*, to all of which authorities we are indebted. Yet the story is worth telling. The outcome of it all may be momentous to the Empire. The controversy now going on as to the Waterways Treaty shows what feelings it may call forth.

"*The Theory of the Constitution.*

"According to our Constitution, it rests with the King to make treaties of all kinds. In some countries their validity depends upon the approval of the Legislature or a branch of it. Thus in the United States the assent of the Senate is necessary to render treaties binding. When that is given a treaty is as valid as if it were a statute. No such assent is with us requisite to give effect to a treaty; that power is vested solely in the Crown. Though valid for many purposes—in all matters as to which the prerogative of the Crown extends and has not been diminished by usage—a treaty may be for some purposes inoperative. The better opinion to-day is that a treaty will not (with certain exceptions) affect the rights which an individual has at common law or by statute. It may not be easy to apply both principles; cases are conceivable in which they would clash with each other. The best and clearest writers cease to be perspicuous or confident when they speak as to this point. To take a case which is not imaginary; a treaty conferred on certain vessels—really private vessels—the immunities of ships of war. The vessel of A, a subject of one of the States, was injured by the vessel of the other State in circumstances in which an action would, in the absence of the treaty immunity, lie against the vessel which did the damage. The Court of Appeal decided, contrary to the opinion of Sir

Robert Phillimore, that the provision in the treaty defining the diplomatic status of the vessels was an act of State binding upon all Courts. But it did not clearly contradict the principle affirmed by the Court below, that provisions in a treaty affecting rights of private persons might be examinable. Such power seems implied in the decision of the Judicial Committee in *Baird* v. *Walker*. It seems to underlie Lord Herschell's words: 'It was admitted that the Crown could not sanction an invasion by its officers of the right of private individuals whenever it was necessary, in order to compel obedience to the terms of a treaty.' At all events, the point remains open. To avoid all questions of this kind and others, it has been the practice in recent times to give statutory effect to certain important treaties, *e.g.* as to the cession of Heligoland. Obviously, a difficulty may arise in carrying out this practice. In the case of a colony which is self-governing, the Legislature may decline to pass the legislation necessary to make the treaty workable. It is conceivable—and, as experience shows, in the case of a small colony possible—that the Imperial Parliament might intervene and pass over the heads of the colonial Legislature such an Act. But in the case of the autonomous Dominions, this is, or will soon be, out of the question. Certainly only altogether exceptional circumstances would justify such intervention on the part of the Imperial Parliament. Canada, it may be added, has acquired by the Dominion Act (s. 132) all powers necessary or proper for performing the obligations of the Dominion or any province as part of the British Empire towards foreign countries arising under treaties between the Empire and foreign countries.

"With the Crown is lodged the treaty-making. For a large class of treaties this is still strictly true, and must be so if the Empire is to remain a unity. Those relating to peace or war and to neutrality must be settled by the Crown; the Colonies cannot have a direct voice as to them; they cannot say whether there shall be a treaty between this country and Japan, or whether it shall maintain the *status quo* in the Baltic or North Sea. As to purely local matters there is some force in Sir John Bourinot's remark that Canada has been too much 'the shuttlecock' of skilful diplomacy. Perhaps the failures of British diplomacy in this respect have been made too much of. A spirit of fairness which disagrees with much earlier stringent criticism is now rife. We note that the other day Judge Longley, of the Supreme Court of Nova Scotia, indignantly denied that there was any foundation for the charge that Great Britain had sacrificed Canada's interests, and contended that in the Ashburton Treaty, the Oregon Settlement, and in regard to the Alaska boundary, the Mother Country had not failed in her duty to her daughter.

"Naturally when Canada attained to self-government she brought before England the question of commercial treaties. Every year that question presents itself in a new form. Some of the Colonies wish to have the benefit of treaty stipulations which the Mother Country or other parts of the Empire

may not claim. Their fiscal systems differ from ours, and they may and do desire a line of action quite contrary to that pursued here. How is the supremacy of the Crown, the necessity of its retaining the treaty-making power, to be reconciled with the demands of the Colonies? No clear answer to this question has yet been found. We are muddling along, solving each difficulty as it arises; but gradually shaping a policy wiser, it may in the end prove, than one framed *a priori*. Though the actual state of things is complex, it is not a mighty maze without a plan. Had the matter been thought out, we should probably have come to some arrangement such as that which is embodied in the German Constitution; while express power is given to the *Reich* to make treaties as to certain matters of high import, the particular States are free to make treaties outside this region. In a haphazard way we have stumbled on a compromise which lacks symmetry but which has its merits.

"*Commercial and Private Rights.*

"The practical problem relates chiefly to two classes of treaties: (*a*) commercial treaties; and (*b*) those which affect directly private rights. There are other classes of treaties which from time to time give trouble, and as to which it is hard to say in particular instances whether Imperial interests or colonial should prevail. The first category has been of more importance in the past; the second is at present most pressing. As to the first of these, some principles have been settled; as to the second, the Home and colonial Governments are still groping after an arrangement satisfactory to both.

"In the first place, no commercial treaty is held to be binding on our Colonies unless it is expressly stated to be so. On the whole, until about 1875, the contrary was the case; they were generally included as a matter of course In Lord Carnarvon's time a change took place, and it was followed by others in the same direction. To quote Mr. Bertram Cox's authoritative statement as to the modern practice: 'A rule has been laid down for some years that when any treaty is made between Great Britain and a foreign Power, a claim is put in to the effect that this clause shall not bind any Colony in any way whatever unless the Colony separately adheres to it; and then when the Colony has separately adhered to it, it may independently terminate it if it thinks fit by giving twelve months' notice.' The power of accession is exercised, as we might expect, most diversely, according to the nature of the treaty. From an interesting return of the accessions of the British Colonies to various treaty engagements between the United Kingdom and foreign Powers, it appears that to the Treaty of Commerce between the United Kingdom and Japan had acceded at the date of the return only Canada, Natal, Newfoundland, and Queensland. On the other hand, to the treaty between this country and the United States (March 2, 1899) relative to the disposal of real and personal property, very many of the Colonies, self-governing as well as Crown Colonies, had acceded.

A formula common in recent treaties is that 'the provisions of the present convention shall only apply to a colony, possession, or protectorate when a notice to this effect shall have been given on its behalf by the Mother Country.'

"Another principle adopted by the Home Government is that, while diversity within the Empire of tariff systems is to be accepted as a concomitant of self-government, the treaty engagements of the Empire must be observed. No Colonial Secretary would think of doing to-day what Lord Kimberley did in 1871—lecturing the Colonies upon the subject of free trade and upon the 'narrow commercial jealousy' of those who differed from him. Some of the Colonies early put forward certain claims as to inter-colonial reciprocity. For example, the Legislative Assembly of Victoria as long ago as 1871 adopted a resolution to the effect that the Legislature of the Colony should be at liberty to authorise arrangements with other Colonies of the Australian group for the reciprocal admission of their products and manufactures on such terms as may be agreed upon, and that such arrangements should not be prevented either by Imperial legislation or by treaties made by the Imperial Government with foreign Powers. Lord Kimberley then laid down the principle: 'Her Majesty's Government are alone responsible for the due observance of treaty arrangements between foreign Governments and the whole Empire, and it would be scarcely possible for the colonial Governments to foresee the extent to which the trade of other parts of the Empire might be affected by special tariff agreements between particular Colonies.' It is true that he went on to say, in reasserting the right of the Crown to conclude treaties, 'subject to the discretion of the Parliament of the United Kingdom or of the colonial Parliaments, as the case may be, to pass any laws which may be required to bring such treaties into operation.'

"The Imperial Government, while not waiving its prerogative, went so far as to pass the Australian Colonies Customs Duties Act, 1873, which gave full power to each of the Colonies concerned to make laws imposing or remitting duties. The prohibition of differential duties contrary to the terms of treaties on goods imported into the Colonies from foreign countries was retained.

"In the Colonial Conference at Ottawa a resolution was passed that 'Any provisions in existing treaties between Great Britain and any foreign Power which prevent the self-governing dependencies of the Empire from entering into agreements of commercial reciprocity with each other or with Great Britain be removed'; the reference being to treaties with Belgium and Germany. Lord Ripon formulated certain principles so important that they are worth mentioning: (*a*) The strict observance of international obligations; (*b*) no concessions to be made by a Colony to any Power unless like concessions are extended to all other Powers entitled to most-favoured treatment in the Colony: (*c*) concessions by a Colony to a foreign Power to be extended to the Mother Country and the rest of the British Dominions.

"A further point has been definitely gained by Canada. In negotiations

with respect to or under treaties affecting her, some representatives of her interest have taken an important part. Sir John Macdonald, Senator Brown, Sir A. Galt, Sir C. Tupper, and Mr. Brodeur have been associated with the representatives of this country; in some instances the entire burden has fallen upon the Canadian statesmen. In the present negotiations with respect to the Waterways Treaty, Canada has been represented at Washington by the Minister of Justice, Mr. Aylesworthy, and Mr. Gibbons.

"*Canada and the United States.*

"The treaties affecting private interests in the Colonies have so far been of much less importance than commercial treaties. The former are, however, likely to give trouble in the future; the difficulties, not yet surmounted, which have arisen as to the Waterways Treaty are a warning that the time has come to revise and perfect our modes of dealing with them. There are several complaints worth considering. The chief has so far come from Canada. One is to the effect that Canadians are put as to such treaties at a disadvantage as compared with citizens of the United States. According to the Constitution of the United States, no treaty is valid unless with the consent of the Senate. This means that in the course of negotiations the draft treaty is submitted to that body and its details are made known to its members. There is no obligation to consider the matter in secret session; details may leak out and become known to those who are interested. Canadians who may be equally interested have no such advantage. The leader of the Opposition and his followers have not unnaturally complained that the people of Canada have in fact not the same means of knowledge as those of the United States. Can this anomaly be corrected? There is a large body of opinion in Canada that Senator Smith's rider to the Waterways Treaty, which would depart from the international line in the St. Marie River and adopt one more favourable to the United States—or, to be more accurate, to a particular Michigan company—is unjust. To safeguard the interests of the Dominion, should all treaties affecting her rights or those of her people be submitted to the Canadian Parliament? Should their ratification be made dependent upon its approval? Of course, the Crown is free to attach any condition it thinks fit to ratifying any treaty; there is no constitutional rule to the contrary. But to say in so many words in an Act of Parliament that in all cases the previous consent of the Dominion Parliament should be requisite to the validity of a treaty affecting its interests, or even for a Secretary of State to approve of this principle in unqualified terms in a despatch, might be objectionable. Has the Government of the United States found it always convenient to obtain the Senate's consent? Has not this condition wrecked or stayed more than one useful treaty? Has it not seriously trammelled diplomacy? Does this provision of the United States Constitution merit close imitation? In the last resort the power of treaty-making must rest with the Crown. But the practice might

be, and in view of the strong feelings of the Colonies ought to be, to consult and be guided by the Dominion Parliament in all that pertains to its interests. In the Arbitration Convention between this country and the United States of April 4, 1908, there was a useful provision which might with advantage be very freely imitated. 'It is understood that such special agreements on the part of the United States will be made by the President of the United States, by and with the advice and consent of the Senate thereof; his Majesty's Government reserving the right before concluding a special agreement in any matter affecting the interests of a self-governing dominion of the British Empire to obtain the concurrence of the Government of that dominion.'

"We shrink from framing a rule applicable to all cases. Formulæ suit inert, dead masses; they are unsuitable for living, virile organisms. The Empire lives by mutual understanding; by pressing no point beyond what practical exigencies require; by the Home and the Dominion Governments adjusting their practice to new circumstances. To make it absolutely obligatory to obtain the consent of Canada, Australia, New Zealand, or South Africa to any treaty affecting them; to try to settle before-hand all the questions sure to arise where their interests conflict; to seek to discriminate between what are local and what are Imperial interests by some cast-iron rules—all this might be to raise even more difficulties than the innovation would settle. Constant friendly communication and consultation will do more than the most carefully drawn rules."

Feudal Japanese Law.—In a paper read before the Asiatic Society of Japan, Mr. J. C. Hall gives an interesting account of the Ashkaga Code, or "Code of the Kemmu year term," promulgated in 1334-8; the second feudal Code of Japan, the first being the Hojo-Shikten. It is chiefly curious as a mixture of legal prohibitions and moral exhortations. The legislator freely indulges in platitudes—in fact, "tupperises": "under the pretext of holding tea-parties or under the disguise of poetical competitions, meetings are held for the purpose of laying gambling debts. Is not the waste caused by this course incalculable?" Here is an extract which has a distinctly modern ring in it: "When a person exerts himself to improve his condition in life and has a new or a bigger house built, he is immediately subjected to an inquisition (by his superiors) as to his means and so forth, and the house taken from him." This is in the spirit of mediæval Japan: "Ceremonial etiquette to be the predominating principle. For regulating a State there is nothing that surpasses a regard for ceremonial formalities."

Capital Punishment in the Crown Colonies.—Whatever the hopes of the humanitarian for the future, the death penalty is still found necessary in our Crown Colonies and Protectorates. There were in 1908 269 death sentences in all passed, and 154 were carried into execution. There is a marked difference, as we might naturally expect, between unsettled parts of the Empire like Northern and Southern Nigeria, Nyassaland, and Sierra

Leone, and the older possessions of the Crown; yet even here Ceylon comes with its forty-one death sentences to warn us against rash generalisation. Another inference—familiar enough—which the Return suggests is that the more numerous the death sentences the fewer are carried out. Human nature is better than its code as well as its creeds. We had experience of that in England a hundred years ago.

Return showing the Number of Death Sentences and Executions in British Crown Colonies and Protectorates during the Year 1908.

Name of Colony or Protectorate.	Number of Death Sentences.	Number of Executions.
British Guiana	1	1
British Honduras	1	1
Ceylon	41	23
Cyprus	2	2
East Africa Protectorate	13	13
Fiji	11	11
Gold Coast (including Ashanti and the Northern Territories)	14	14 (*a*)
Hong Kong	1	—
Jamaica	2	—
Malta	1	1
Northern Nigeria	42	20 (*a*)
Nyasaland	23	11
Sierra Leone	24	9 (*a*)
Southern Nigeria	77	42 (*b*)
Southern Rhodesia	1	—
Straits Settlements	7	—
Trinidad	4	3
Uganda	2	2
Western Pacific	2	1

(*a*) Includes one sentenced in 1907. (*b*) Includes three sentenced in 1907.

Note.—The Native States of the Malay Peninsula and certain other Protectorates have not been included in this Return.

Assessors to the Privy Council in Oversea Appeals.—The following suggestion on the subject comes from Mr. J. E. Hogg. "The House of Lords can summon the Judges to assist with their advice. The Court of Appeal and the High Court also have the power of calling in the aid of assessors. The Judicial Committee may also call in bishops as assessors in ecclesiastical cases. Until the passing of the Appellate Jurisdiction Act, 1908, the Judicial Committee had no power to call in assessors in other than ecclesiastical cases, and thus the tribunal which was more in need of outside assistance than the House of Lords, or the Supreme Court of Judicature, had less power to supply the need. The new Act of 1908 is, however, of extremely limited scope, and under it nothing more than the possible and occasional help of a colonial Judge is to be looked for. What is wanted is that the Judicial Committee should have the power to call in any one of competent knowledge and

responsibility to advise them with respect to local law and local conditions generally when appeals from the oversea dominions are being heard. A Bill has been drafted with this end in view, by which it is proposed that a permanent panel of assessors should be created, consisting of men resident in London and available at any time as assessors. The subject has not yet attracted much attention, but it is gradually being recognised that expert assessors would be of the greatest service in informing the Judicial Committee with respect to local law and conditions overseas."

Motor Legislation.—The following paragraph is reprinted from *The Times* of April 20, 1909: "It is a noticeable feature of legislation in respect to automobiles in the various parts of the British dominions that the conditions are more stringent than in the United Kingdom. In the Dominion of Canada the climax appears to have been reached in Prince Edward Island, where a total prohibition law (8 Edw. VII. c. 13) was passed last year. The preamble sets forth: 'It has become necessary in the public interest and for the safety of the travelling public to prohibit the use and operation of motor vehicles on the highways and public places' in the province. 'Motor vehicles' are defined (s. 1) to include 'all motors, automobiles, or any vehicle propelled by any power other than muscular power except such vehicles as run only on rails and steam road rollers.' The enacting clause (s. 2) is as follows: 'No person shall, after the coming into force of this Act, use or operate upon a public highway in this province any motor vehicle.' The penalty for infringement of the law is $500 or six months' imprisonment. In Nova Scotia the Legislature appears to be feeling its way to a similar enactment. An Act of last year (8 Edw. VII. c. 53) authorises 'every city, town, or municipality in the province of Nova Scotia to make regulations prohibiting the use and operation on certain days of each week of motor vehicles upon any of the public highways of such city, town, or municipality, and providing penalties for any violation of said regulations' (s. 1). The maximum speed permitted even in country districts is fifteen miles per hour, and that appears to be the general rule in the Canadian provinces. It is interesting to note some of the details in which legislation compels the drivers of automobiles to have consideration for other users of the highways. In Ontario a recent amendment (8 Edw. VII. c. 53, s. 4) requires 'the driver of a motor vehicle upon any public street or highway outside the limits of a city upon meeting or overtaking a funeral procession to stop his motor vehicle and, where practicable, to turn out into any intersecting street, road, or lane, until the funeral procession has passed.' It is difficult to understand how under the section the driver could overtake the funeral procession, but though the letter of the law is vague it would be obeyed in the spirit by any thoughtful driver without any specific enactment. In Manitoba the local authorities may exclude motors from cemeteries (7 & 8 Edw. VII. c. 34, s. 36). Other details include the prohibition of anything in the nature of a searchlight, directions as

to the rule of the road in passing animals, and the assistance to be rendered in the event of their taking fright. The Australasian Legislatures, active upon so many matters, have not had occasion to deal with the regulation of automobiles to any considerable extent, but an examination of the laws in other parts of the Empire shows that there are few places so hospitable to them as the home country."

Immovable Property Registration and Valuation: Cyprus (No. 12).—"This law," writes Mr. Stanley Fisher, "passed in 1907 and assented to in 1909, is a very important enactment. It aims at facilitating the enforcement of registration, replacing provisions in the Titles Registration Law, 1885, which were practically a dead letter. It also provides for a general re-valuation of the immovable property in the Island for the purpose of assessing the Verghi Kimat, an annual tax of 4 per 1000 on the capital value of immovable property, and registration fees. The re-valuation is to be completed within twenty years from the coming into force of the Law. It is to be carried out by two valuers, one of whom will be appointed by the High Commissioner, and the elected members of the Legislative Council who represent the district in which the valuation is made are empowered to appoint the other; in default of their so doing the High Commissioner will appoint. Provision is made for referring differences and disputes as to valuations to a Court of Law. One ultimate result of the re-valuation is to be that the total annual yield of the Verghi Kimat for the whole island is not to exceed £29,000. The Law also contains provisions for commutation of succession duties, for reducing certain registration fees, for facilitating partition, and for regulating and safeguarding its own working."

The Rhodian Sea-Law.—The Editors are indebted to Mr. Wallwyn Shepheard for the following note on Mr. Walter Ashburner's *Rhodian Sea-Law*, recently published by the Clarendon Press.[1] A more detailed notice of this valuable work will appear later.

"The industry, scholarship, and critical acumen," says Mr. Shepheard, "displayed in this work are characteristic of the learned author. The numerous manuscripts used for this edition are specifically described; and in his preface the editor acknowledges the courtesy of the heads of various libraries, or manuscript-rooms, in facilitating his researches. He mentions his special indebtedness to the Prefect of the Vatican Library, the librarian of the venerable monastery of Grotto Ferrata, the authorities of the Vallicelliana, Laurenziana, and Riccardiana, Signore Levi of the Marciana, and M. Omont of the National Library, and the late Prefect of the Ambrosian Library.

[1] Νόμος Ροδιών Ναυτικός, *The Rhodian Sea-Law*, edited from the manuscripts by Walter Ashburner, M.A., of Lincoln's Inn, Barrister-at-Law, late fellow of Merton College, Oxford. Oxford: at the Clarendon Press, 1909.

"The Sea-law in this edition is divided into three parts : viz.—

"Part I. The Prologue.

"Parts II. and III. The Sea-law.

"The appendices to the text contain the Prologue and some other matter which the editor desired to keep separate from the Sea-law because such matter did not in his opinion form part of its original composition.

"The Greek text of Sea-law and matter in the appendices is based on the editor's critical examination and comparison with one another of the numerous manuscripts he has used; he has added an English translation of the Greek text; he has given an elaborate critical apparatus and the material variants of all the independent manuscripts in order to enable—so states the editor—the learned student to form his own text.

"We gather that the editor's conclusions are that the Sea-law was probably put together by a private hand between A.D. 600 and A.D. 800 from material of very different epochs and character, and that the portion of the Sea-law contained in Part III. of the text was evidently composed to be a part of Book LIII. of the Basilica.

"In the very full Introduction to the text of the Sea-law the editor compares the maritime law of the Byzantine empire—treating for this purpose the Basilica and the Sea-law as forming one system—with the maritime law of the Mediterranean States in the early Middle Ages, so far as it can be gathered from those sources which come nearest in age to the Basilica and the Sea-law. For this purpose a list of the texts used by the editor—some thirty in number—with their full titles are given. In addition the city statutes and maritime statutes—twelve in all, ranging from A.D. 1156-60, Constitutum Usus (Pisan), to A.D. 1345, Consolat Trapani—are referred to; and these are followed by references to maritime custom as prevailing in Venice, Amalfi, and, perhaps, generally for the whole Mediterranean; and lastly, as of some evidential value, to mediaeval commercial documents.

"The comparison thus made by the editor between, what for concise reference he terms, the maritime laws of the Byzantine and mediaeval systems becomes an exposition of the evolution of the maritime law in Mediterranean Europe up to the period of the commercial renascence in the thirteenth century.

"The volume concludes with valuable Indexes of Greek and Latin words and phrases, and of the subject-matter under classified headings.

"In this brief notice we have attempted—most inadequately, we fear—to indicate the substance, value, and merits of the edition of the Sea-law in the volume before us."

Mediæval Plimsollism.—Among the many points of interest in Mr. Ashburner's edition of the Rhodian Sea Laws—an edition which must supersede all others—is a statement as to early legislation against overloading. Mr. Plimsoll was anticipated by some of the early maritime codes in use

in the chief sea towns on the Mediterranean. A mark was put on the outside of the ship, and it was officially examined before the vessel sailed. "The mark must not lie more than a certain depth below the water-line. The depth at which it is allowed to lie varies with the ship's age. If it lies too deep goods are taken out until the ship rights itself, and the owner is fined." There is a distinctly modern air in some of the exceptions: *e.g.* at Venice, in favour of vessels which sail within the gulf of Venice.

Comparative Law in Blue Books.

[*Contributed by* C. E. A. BEDWELL, ESQ.]

Lord's Day Observance.

A REPORT has been published by the Foreign Office containing the legislation in foreign countries respecting a weekly rest day. It is one of the subjects upon which laws have been passed in several European countries during the past few years. Particulars are given of the legislation in Austria, Belgium, Denmark, France, Hungary, Italy, Netherlands, Spain, Sweden, and Switzerland, with a brief summary of the laws in the different States of the United States (Cd. 4468. 3*d.*).

Registration of Firms.

Under the auspices of the Commercial Department of the Board of Trade has been prepared a report containing complete particulars of the laws upon this subject in foreign countries and the British dominions (Cd. 4420. 1*s.* 6*d.*). The following is the introduction by the Controller of the Department.

[*Note.*—A *Société en nom collectif* is substantially the same as a partnership formed under British law. The terms *Commandite Firm*, *Société en Commandite*, and *Limited Partnership* are employed in this Introduction as in the Reports printed in the body of the Return. They signify substantially the same thing.]

In June, 1906, reports were asked for by His Majesty's Government, at the instance of the Board of Trade, on the subject of the laws and regulations in force in British Colonies and Possessions, in India, and in the various foreign countries, governing the registration of commercial firms, with especial reference to the question whether such firms are required to register the names of all responsible partners and of persons who are authorised to sign and act on their behalf.

From the replies received it appears that all the foreign countries concerned have legislated on the subject, with the exception of Abyssinia; that there is no law in force requiring firms to register in British India; and that the following Colonies have no legislation on the subject:—Barbados, Bermuda, British Central Africa, British Guiana, British Honduras, Cayman Islands, Cyprus, Dominica, East Africa Protectorate, Falkland Islands, Fiji, Gambia, Gibraltar, Hong Kong, Labuan, Leeward Islands, St. Helena, Sierra Leone, Somaliland, Southern Nigeria, Southern Rhodesia, Straits Settlements, the Transvaal, Trinidad, and Uganda.

The Governor of the Bahamas states that the only Act in force in that Colony dealing with the subject is an obsolete Act of the year of 1861—"An Act to authorise the formation of partnerships with limited liability"—and that it does not appear that any firm has ever been registered under its provisions.

(i) BRITISH COLONIES.—In *Australia* the laws of the various States have a general similarity, while differing in detail. Partnerships and persons trading alone under a firm-name are required to register before commencing business, and changes in the constitution of a firm must be duly registered within a fixed time. Re-registration is necessary on change of the firm-name; and in *South Australia* re-registration is necessary every five years. The *Territory of Papua* has adopted its laws in this connection from Queensland; but apparently these laws only apply to companies.

In the *Bahamas* the only Act in existence is an obsolete law of 1861 authorising the formation of limited partnerships, and it is stated that no firm appears to have been registered under its provisions.

In *Canada* the law varies in the different provinces. Trading partnerships are required to register except in *Manitoba*; persons trading alone under a firm-name are required to register except in *Manitoba*, *New Brunswick*, and *Prince Edward Island*. The time within which registration must be effected varies. In New Brunswick, for instance, firms must register before commencing business; in Ontario within six months after commencement of business. Declarations are generally required to be filed on change of partnership or firm-name, or dissolution of partnership. In the case of extra-provincial corporations in *Quebec* the registration of powers of attorney given to non-partners is also required. Laws providing for the registration of limited partnerships exist in most of the provinces.

In the *Cape of Good Hope*, *Jamaica*, *Newfoundland*, and *New Zealand* legislation provides only for the registration of limited partnerships; except that in the case of *Jamaica*, a return must be made to the Stamp Commissioner showing the names and addresses of all partners in banks, their places of business, names of public officers, etc.

In *Ceylon* provision exists for the optional registration of powers of attorney.

In the *Gold Coast* partnerships and persons trading alone under a firm-name must register, both originally and on the occasion of a change taking place.

Malta requires commercial partnerships en nom collectif to register full particulars, as well as all changes which may take place. Provisions are also made or registration of commandite firms.

The law of *Mauritius*, which is founded on the old French Commercial Code, may be summarised in the same terms as those used in the case of Malta.

In *Natal* registration is necessary for firms and persons trading under a firm-name. Powers of attorney, held for the purpose of transacting the business of firms, by persons other than partners, must also be registered. Re-registration is necessary on change of firm-name; and all changes in constitution or ownership or in place of business must be registered. Provisions also exist for the registration of limited partnerships.

No provisions for registration of firms exist in *Northern Nigeria*; it is, however, usual for principals granting powers of attorney to notify the Government.

In the *Orange River Colony* there is no regular system of registration, but persons engaged in a large number of trades and professions are required to take out licences, which contain, among other particulars, the names of the partners and the firm-name.

In the *Seychelles* the old French Code of Commerce is in force, as in Mauritius (see above).

As regards the *Windward Islands*, no legislation on the subject exists either in *Grenada* or *St. Vincent*; but in *St. Lucia* partnerships are required to register, and no partner is deemed to have left the partnership until a new declaration is filed to that effect.

(ii) BRITISH INDIA.—There is no legislation on the subject in *British India*.

(iii) FOREIGN COUNTRIES.—In the *Argentine Republic* registration is necessary for traders who wish to enjoy certain advantages (such as the right of making agreements with their creditors, or of recommencing business after a settlement with their creditors) which are not extended to unregistered firms. The documents required to be registered are somewhat numerous and include the deed of partnership; they must always be registered within fifteen days of their date. Powers of attorney given to factors or employees to carry on the business of their employers must also be registered. Provisions also exist for registration of commandite firms.

In *Austria* all merchants (except pedlars), who pay a trade tax not less than a certain amount, and all partnerships are required to register in considerable detail. The alteration or extinction of a firm, as well as other particulars, including the grant and withdrawal of powers of attorney, must be duly notified. Provisions also exist for registration of commandite firms and of co-operative societies.

In *Belgium* only the regular commercial companies and partnerships formed under the Belgian Company Laws (including Sociétés en nom collectif and en commandite) are bound to register. These must register and publish their Articles of Association and all modifications thereof, as well as the names of all persons authorised to sign and act for the firm.

In *Brazil* commercial co-partnerships, before commencing business, must register in the Registry of Trade and Commerce the tenor of their partnership agreement. The particulars required to be given in this are very full. Provision is also made for the protection of trade-firms or styles by means of a Register in which individual merchants or co-partnerships are at liberty, if they so desire, to enter the name or style of the firm under which they carry on business. Any illegal adoption or use of a registered firm entitles its rightful owner to damages.

In *Bulgaria* merchants are required to register at the time of commencing business; notice must also be given of changes in or cessation of firm-name. Powers of attorney, and their withdrawal, must also be registered and published.

The law of *Chile* requires commercial firms to register a very full extract from their document of association. Foreign firms opening branches in Chile must obtain permission from the President.

In *Colombia* individuals are only required to register if they are engaged in certain particular trades. Commercial partnerships of whatever kind must register a detailed extract from their document of association; they must also register a fresh document on the occasion of any change in any matter contained in the original document. Foreign associations or companies must register within six months of commencing business; they must also have an agent in Colombia, and file his power of attorney.

In *Cuba* registration is, in practice, optional for private firms. Companies, however, are required to register full details. Any alteration in a registered document must itself be registered.

Registration is also optional in *Denmark* for persons trading under their own name; for other firms it is compulsory. Powers of procuration and their with-

drawal must in all cases be registered. Provisions also exist for registration of commandite firms.

In *Egypt* commercial firms are required to deposit an extract from their act of association within fifteen days of its signature. Publication of the extract is also necessary.

In *France* the law only affects such firms as are constituted as Sociétés en nom collectif or en commandite. These are required to file, within one month, a duplicate of their constitutive act, and to publish an extract.

In *Germany* registration is compulsory for all merchants, as defined by the Commercial Code, and for all partnerships, including commandite firms. Powers of procuration must be registered.

The law of *Greece* requires Sociétés en nom collectif to register a copy of their act of association, and an abstract from it is to be registered and posted up within fifteen days of its signature. A similar abstract must also be registered by Sociétés en commandite.

Partnerships in *Guatemala*, including commandite firms, must submit their deed of partnership within eight days of its approval, and publish an extract from it by circular. Any changes must be accompanied by the same formalities. It is usual to publish powers of attorney.

In *Hungary* partnerships, including commandite firms, and every one carrying on trade (with certain exceptions) must register at the time of commencing business. Notice must be given of any change in the firm or cessation of business. Notice must be given of the granting or withdrawal of powers of attorney.

No provisions exist in *Italy* requiring individual traders to register; but partnerships, including commandite firms, must be constituted by a private deed, a summary of which must be filed within fifteen days of its adoption. Foreign firms must deposit, besides this, their whole memorandum of association.

In *Japan* partnerships, including commandite firms, must register if they desire to be recognised as such. They are required to furnish detailed particulars of their constitution. Foreign companies opening branches in Japan must register in the same manner, and must further appoint and register a representative residing in Japan. They are also required to file certain documents on application for registration.

Registration in *Mexico* is optional for individuals, but compulsory for firms, including those en commandite. Among other particulars the deed of association must be filed. Foreign companies must add proof of the legalisation of their statutes and many other details.

In the *Netherlands* partnerships, including those en commandite, are required to register a copy of, or extract from, their deed of partnership showing full particulars. All changes which could affect third parties must also be registered.

In *Norway* individuals as well as "unlimited companies" must register. Powers of procuration may be registered.

Peru also requires merchants and mercantile societies to register in considerable detail. Foreign companies must register, besides their deed of partnership, a certificate from the Peruvian Consul in their native country stating that they are legally constituted. General powers of attorney must be registered.

In *Portugal* persons trading alone may use only their own name in full or abbreviated. Firms must register and file their agreement of partnership. Changes must be registered, and it is strongly advisable (though not obligatory) to register powers of attorney.

In *Roumania* merchants and commercial associations are required to register;

changes, dissolution, etc., must also be registered, as well as powers of procuration granted for the conduct of the business.

No general law exists in *Russia* requiring registration, but business associations trading under a collective name and those having sleeping partners must furnish an extract from their articles of association giving detailed information.

In *Servia* every merchant engaged in business, either alone or in partnership, must register his firm-name. No other details need be given.

In *Spain* registration is optional (though highly desirable) for private persons, but compulsory for partnerships and companies. Among other particulars, general powers given to managers, etc., and their revocation are registered. Foreign companies must also present a certificate issued by a Spanish Consul to the effect that they are constituted in accordance with the laws of their own country.

In *Sweden* commercial firms and persons trading alone are generally required to register. Provision is also made for the registration of general powers of attorney, but such registration is optional.

In *Switzerland* persons trading alone and Sociétés en nom collectif are required to register various particulars, including the names of persons authorised to act for the firm. Provisions also exist for registration of Sociétés en commandite and "Associations."

In the *United States of America* there is no federal legislation on the subject of registration of firms. In most of the States of the Union no laws exist requiring firms to register, and in the others the legislation on the subject is of so varied and intricate a nature that a general summary of its provisions cannot usefully be made.

No information is available as regards the laws in force in *Delaware*, *Nevada*, or *Pennsylvania*.

In *Uruguay* merchants and companies are required to register in considerable detail; among other particulars to be registered are powers of attorney granted for the purpose of carrying on the business.

Finally, in *Venezuela*, firms are required to register the signatures of their principals, whether alone or as partners, the "sale of a commercial signature," and powers granted to subordinates to carry on business. Foreign firms are more stringently dealt with, and, besides registering, must have a duly authorised representative resident in Venezuela.

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